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THE LANGUAGE AND CULTURE (NOT TO SAY RACE) OF PEREMPTORY CHALLENGES

SHERI LYNN JOHNSON*

[A] rose [b]y any other name would smell as sweet.¹

On this record, the removal of the last two Latino jurors for what in the end is simply their proficiency in the Spanish language, should not be sanctioned.²

I. INTRODUCTION

In *Batson v. Kentucky*,³ the Supreme Court held that racial discrimination in the exercise of the peremptory challenge violates the Equal Protection Clause.⁴ But what is racial discrimination in this context? Even as *Batson* was announced, Justice Marshall expressed doubt that the procedure established by the Court would be adequate to identify the prohibited discrimination.⁵ In *Hernandez v. New York*,⁶ a case that has generated remarkably little academic interest, the Supreme Court gave a partial answer to this question: at least in a case with Spanish speaking witnesses, striking Latino jurors based on their proficiency in Spanish does not constitute racial⁷ discrimination.⁸ That answer brings into bold relief the concerns raised by Justice Marshall.

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1. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc.2.

2. *People v. Hernandez*, 552 N.E.2d 621, 629 (N.Y. 1990) (Kaye, J., dissenting), *cert. granted in part*, 498 U.S. 894 (1990), *and aff'd*, 111 S. Ct. 1859 (1991).

3. 476 U.S. 79 (1986).

4. *Id.* at 89.

5. *Id.* at 102-08 (Marshall, J., concurring); *see also infra* notes 87-102 and accompanying text.

6. 111 S. Ct. 1859 (1991).

7. Arguably a more precise reference to discrimination against Latinos is national origin discrimination, however, because most courts lump the two together under the phrase racial discrimination, I will do the same. As national origin is also a suspect class, the distinction has no doctrinal consequences.

8. *Hernandez*, 111 S. Ct. at 1867.

I see race as the most pervasive and intractable single issue facing the criminal justice system in the foreseeable future. Undoubtedly, my prior work shapes this perception, but it is far from idiosyncratic. Public polls—even before the Rodney King beating case—reflect widespread public concern about criminal justice system inequities.⁹ *McCleskey v. Kemp*¹⁰ silenced constitutional dialogue about racially disparate results but, at least in theory, the Court's decision in *Batson* encourages constitutional dialogue regarding race and procedure, or more precisely, dialogue concerning the race of the decisionmakers. Thus I come back again and again to jury selection.

The history of race and jury selection is a long one, yet it must not be edited too sharply. Dicta and ambiguities one might be tempted to prune keep sprouting new leaves. The very first question one would expect the cases to answer finds expression in the subtitle of Barbara Underwood's recent article, *Whose Right Is It, Anyway?*¹¹ Despite the primary nature of this question, I think any fair reading of the case law must acknowledge that twined throughout the jury discrimination cases are rationales relating to the defendant, the juror, and the public. Underwood acknowledges the tangled roots, and she argues for the adoption of an excluded juror focus.¹²

By contrast, this Article focuses on the defendant's claim that race-based jury selection denies her the equal protection of the laws. Historically, the lion's share of the jury selection case law has worried about the defendant,¹³ but it is not historical pedigree that determines my topic. Though I would not dispute the excluded juror's claim which Underwood champions, I find it vastly less compelling than the defendant's claim. Ultimately, my interest in ra-

9. See, e.g., *Black and White: A Newsweek Poll*, NEWSWEEK, Mar. 7, 1988, at 23 (finding that 34% of whites and 66% of blacks believe the U.S. justice system treats black people charged with crimes more harshly than white people charged with crimes).

10. 481 U.S. 279 (1987) (holding that because Georgia's capital punishment law did not discriminate purposely against the black defendant, the State had not denied the defendant equal protection of the laws).

11. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992).

12. *Id.* at 742-50.

13. See *infra* discussion parts II.C., II.D.3.

cially just outcomes (thwarted from direct assertion by *McCleskey*) makes me deem this claim the one worth pursuing.

This Article will argue that although *Hernandez* is wrong, the decision is neither aberrational nor a throwback, but is directly traceable to the questions left unanswered by *Batson*. Indeed, the widely celebrated *Batson* progeny, those cases which extend *Batson*'s duties to new parties and circumstances, suffer from the same disease as does the family scapegoat, *Hernandez*. Without a direct answer to the question of what racial discrimination is in this context, the family cannot be saved—or is not worth saving. Part II reviews the background of the race and jury selection issue, critically describing the progression of cases with a focus on the effects on defendants of color. Part III attempts to discern the definition of racial discrimination implicit in the *Batson* progeny, then broadens the lens a bit to ask whether that definition can be defended, either by reference to defendants' interests or by reference to some other interest, and concludes that it cannot. Part IV offers an alternative conception of racial discrimination in jury selection, and considers some implications of that conception for the law of peremptory challenges.

II. THE HISTORY OF RACIALLY MOTIVATED EXCLUSION OF JURORS

The representativeness of a particular jury depends upon both the selection of the venire panel and the selection of prospective jurors from that panel.¹⁴ Though all jury selection law is plagued with confusion about the underlying right, the histories of those two selection processes have been very different. The former has been the subject of congressional and judicial concern for more than a century,¹⁵ while the latter process was unconstrained until the 1986 decision of *Batson v. Kentucky*,¹⁶ and even today is regulated far less stringently.

14. See *infra* discussion parts II.A., II.B.

15. See *infra* notes 17-19 and accompanying text.

16. 476 U.S. 79 (1986).

A. *Background: The Venue Selection Cases*

In 1875 Congress prohibited the race-based exclusion of any qualified citizen from jury service¹⁷ and in 1880, *Strauder v. West Virginia*¹⁸ held that a state statute excluding black people from jury service violated the black defendant's right to equal protection.¹⁹ Prominent in the Court's reasoning was the threat of white racism. "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."²⁰ In a related vein, *Strauder* spoke of equality between defendants, and concluded that the law does not protect equally if "every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not."²¹

Strauder contains language referring to the effect on the excluded jurors, language that commentators and later opinions cite to support a juror's right not to be excluded on the basis of race.²² To impose such an interpretation on this language, however, requires chopping off the end of the sentence, for *Strauder* referred to the effects on the juror to explain how these effects translate into harm for the black defendant:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to the race prejudice which is an impedi-

17. Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 336 (codified as amended at 18 U.S.C. § 243 (1988)).

18. 100 U.S. 303 (1880).

19. *Id.* at 308.

20. *Id.* at 309.

21. *Id.*

22. Professor Underwood is more forthright about this language than are the Court's later opinions. She acknowledges that *Strauder* mentions the injury to jurors "not as the central rights violation in the case, but rather as an additional reason for recognizing the defendant's personal right to equal protection." Underwood, *supra* note 11, at 743.

*ment to securing to individuals of the race that equal justice which the law aims to secure to all others.*²³

Strauder did not discuss the injury to jurors as the source of a separate and distinct rights violation, and in the next 100 years of criminal jury selection case law, even bare references to the injury to black jurors vanished.²⁴ Until *Batson*, the only Supreme Court case that invoked injury to excluded jurors was an isolated civil case brought by black potential jurors seeking an injunction.²⁵

Thus with a fairly clear focus on the defendant, the Court soon extended its ruling in *Strauder* to the exclusion of grand jurors on the basis of race²⁶ and the racially discriminatory administration of facially neutral petit jury selection laws.²⁷ Although the impact of the early cases was limited due to stringent requirements for showing purposeful discrimination,²⁸ from 1935 on, the Court steadily eroded those requirements. In *Norris v. Alabama*,²⁹ the Court held that a showing of the existence of a substantial number of black citizens in the community, coupled with their total exclusion from jury service, sufficed to shift to the state the burden of proving that the exclusion did not flow from discrimination.³⁰ In *Norris*, the Court declared that this burden could not be satisfied by general denials that no one was excluded on the basis of color or assertions that qualified black persons were not known to the jury commissioners.³¹ Next, the Court extended the burden-shifting rule of

23. *Strauder*, 100 U.S. at 308 (emphasis added).

24. Perhaps the original mention of the juror was prompted in part by the egregiousness of her exclusion. The administrative discrimination at issue in later cases places less of a "brand" upon the jurors than did the statutory discrimination noted in *Strauder*.

25. *Carter v. Jury Comm'n*, 396 U.S. 320 (1970); cf. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (stating that race is unrelated to fitness as a juror).

26. See *Ex parte Virginia*, 100 U.S. 339 (1880).

27. See *Neal v. Delaware*, 103 U.S. 370 (1881).

28. See, e.g., *Thomas v. Texas*, 212 U.S. 278, 282 (1909) (stating that because "the negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors," the defendant's conviction should stand); *Smith v. Mississippi*, 162 U.S. 592 (1896) (holding that the defendant's motion to quash the indictment on the ground that blacks were excluded from the grand jury could be sustained only by independent evidence of purposeful exclusion).

29. 294 U.S. 587 (1935).

30. *Id.* at 594-95, 598.

31. *Id.* at 598-99.

Norris to cases of gross underrepresentation.³² Then the *Norris* rule was applied to cases in which substantial disparity existed between percentages of minority group members in the population and on the jury list, provided the proponent of the discrimination claim could show that at least part of the disparity originated at a point in the selection process "where the jury commissioners invoked their subjective judgment rather than objective criteria."³³

Finally, in 1977 the Court held that a defendant established the burden-shifting *prima facie* case of racial discrimination by nothing more than a showing that the vicinage population was 79.1% Mexican American but that only 39% of the persons summoned for grand jury service were Mexican American.³⁴ That same year the Court declared the jury selection cases to be aberrational discriminatory purpose cases.³⁵ Ordinarily, statistical proof must present a "stark" pattern to suffice as proof of discriminatory intent, but "[b]ecause of the nature of the jury-selection task we have permitted a finding of constitutional violation even when the statistical pattern does not approach [such] extremes."³⁶

Thus, venire selection law comes close to assuring the defendant a "representative" venire. It does nothing for the defendant who is tried in an area where few members of her race reside; the Court has been adamant that no defendant has a right to a jury of any particular composition.³⁷ For defendants accused of crimes in areas with substantial minority populations, however, venire selection requirements produce a venire likely to contain a significant number of jurors who are not biased against them.

32. See, e.g., *Avery v. Georgia*, 345 U.S. 559 (1953) (holding that a *prima facie* case of discrimination, which the state had the burden to overcome, was established where 60 prospective jurors were empaneled in a rape case, and not one of those prospective jurors was black).

33. *Turner v. Fouche*, 396 U.S. 346, 360 (1970).

34. *Castaneda v. Partida*, 430 U.S. 482, 495-96 (1977).

35. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 n.13 (1977).

36. *Id.*, cited with approval in *McCleskey v. Kemp*, 481 U.S. 279, 293-94 (1987).

37. See, e.g., *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972) (explaining that the Constitution forbids only the "systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels"); *Virginia v. Rives*, 100 U.S. 313, 323 (1880) (asserting that "a mixed jury is not essential to the equal protection of the laws" and, hence, is not guaranteed by the Fourteenth Amendment).

B. *Swain v. Alabama*

Judicial treatment of the racially motivated selection of individual jurors has been far less sympathetic to fairness concerns. Although in the venire selection cases the Court maintained that the exclusion of minorities impairs the jury system's impartiality and legitimacy, it took more than a century for the Court to recognize that those concerns had any implications for the selection of particular jurors.³⁸ Dicta in even the earliest venire selection cases suggested the Court's disinterest in the selection of individual jurors,³⁹ and in *Swain v. Alabama*⁴⁰ the Court held that it was "permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged."⁴¹ *Swain*, unlike the venire selection cases, contains no expression of concern for, or outrage on behalf of, the defendant tried by a racially hostile jury.⁴²

The Court unanimously held that no valid claim arose from the fact that Swain's prosecutor had used his peremptory challenges to eliminate all six black jurors from Swain's jury.⁴³ The Court reasoned that the function of the peremptory challenge could be performed only if each side could act upon hunches and characteristics, such as race, normally irrelevant to legal proceedings; "[f]or the question a prosecutor . . . must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be."⁴⁴ The parallel reasoning from the venire selection cases—that white jurors were *more* likely to be "partial" than black jurors, thus denying black

38. See discussion *infra* part II.C.

39. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880) (stating that the constitutional question is not whether one has a right to a jury composed "in whole or in part of persons of his own race or color").

40. 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

41. *Id.* at 223.

42. Although the Court noted that no black person had been on a jury in Talladega County "since about 1950," the Court simply asserted that the "petitioner has not laid the proper predicate for attacking peremptory strikes." *Id.* at 226.

43. *Id.* at 210-11, 221-22.

44. *Id.* at 220-21.

defendants the equal protection of the laws⁴⁵—seems to have entirely eluded the Court.

Swain also claimed that prosecutors in his county had used their strikes systematically to prevent black people from serving on juries.⁴⁶ On this issue the Court was divided. The majority agreed that if the defendant could prove that *regardless of the crime, the defendant, or the victim*, the state sought to remove black people from juries, this would subvert the purpose of the challenge and would raise a Fourteenth Amendment claim.⁴⁷ Then the Court held that Swain had not met this burden because he had not proven that the prosecutor *alone* was responsible for the absence of black jurors from all civil and criminal cases in his county.⁴⁸ Three justices dissented on this point, objecting that the defendant had made out a *prima facie* case under the venire selection case standard by virtue of his proof that no black person had ever served on a jury in that county.⁴⁹

Over the next twenty years, no lower court found that the *Swain* standard had been satisfied.⁵⁰ Adhering to the Court's rationale, they deemed evidence that prosecutors repeatedly had struck black jurors in black defendant cases irrelevant.⁵¹ A stream of harsh commentary, mostly student notes, followed *Swain*.⁵² Slowly this resistance found judicial voices, first in dissenting opinions,⁵³ then in maverick uses of the federal supervisory power,⁵⁴ and finally in state court decisions interpreting state constitutions.⁵⁵ The Supreme Court steadfastly refused to revisit *Swain* until the Sec-

45. See *supra* discussion part II.A.

46. *Swain*, 380 U.S. at 202.

47. *Id.* at 224.

48. *Id.* at 226.

49. *Id.* at 228-47 (Goldberg, J., dissenting).

50. Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1658 n.240 (1985).

51. *Id.*

52. *Id.* at 1659 n.242.

53. See, e.g., *State v. Jack*, 285 So. 2d 204 (La. 1973) (Barham, J., dissenting); *State v. Gray*, 285 So. 2d 199 (La. 1973) (Barham, J., dissenting); *Commonwealth v. Martin*, 336 A.2d 290 (Pa. 1975) (Nix, J., dissenting).

54. See Johnson, *supra* note 50, at 1659 nn.246-47.

55. *Id.* at 1659-63 (discussing the cases of *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), and *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979), and their effects on other state courts).

ond Circuit Court of Appeals held that the Sixth Amendment guarantee of an impartial jury was violated by racially motivated exercises of the peremptory challenge.⁵⁶ Shortly thereafter, the Court granted certiorari in *Batson v. Kentucky*.⁵⁷

C. *Batson v. Kentucky*

Batson, an African American man, was tried and convicted by an all-white jury.⁵⁸ The prosecutor had used his peremptory challenges to strike four black persons from the venire.⁵⁹ Upon defense counsel's motion to discharge the jury on the ground that the prosecutor had violated the Sixth and Fourteenth Amendments to the Constitution, the trial judge opined that the parties were entitled to use their peremptory challenges to "strike anybody they want to," and denied the motion.⁶⁰ Before the Supreme Court, Batson pressed his Sixth Amendment claim,⁶¹ but the Court decided the case on equal protection grounds.⁶²

1. *The Majority Opinion*

Batson holds that the Equal Protection Clause "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."⁶³ The Court rejected *Swain's* two central premises, holding that a *prima facie* case could be established through reliance on the facts in the defendant's case alone,⁶⁴ and deeming unconstitu-

56. *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *cert. granted and judgment vacated*, 478 U.S. 1001 (1986). For a more detailed description of the case, see Johnson, *supra* note 50, at 1663-66.

57. 476 U.S. 79 (1986).

58. *Id.* at 82-83.

59. *Id.* at 83.

60. *Id.*

61. *See id.* at 84-85 n.4.

62. In *Batson*, the Court expressly reserved the question of whether race-based peremptory challenges violated the Sixth Amendment. *See id.* In 1990, the Court decided that there is no Sixth Amendment violation. *See Holland v. Illinois*, 493 U.S. 474 (1990) (rejecting the argument that the defendant had a right, under the Sixth Amendment, to be tried by a representative cross-section of the community).

63. *Batson*, 476 U.S. at 89.

64. *Id.* at 95.

tional the presumption that black venirepersons will be biased in favor of black defendants.⁶⁵

The Court first declared that “[a] single invidiously discriminatory governmental act” is not “immunized by the absence of such discrimination in the making of other comparable decisions.”⁶⁶ Instead of building a record based on other cases, the defendant could establish a *prima facie* case of racial discrimination in the exercise of the peremptory challenge by showing that she was a member of a cognizable racial group and that the prosecutor had exercised peremptory challenges to remove venire members of the defendant’s race.⁶⁷ The defendant may rely on the fact that peremptory challenges are a jury selection practice that permit discrimination by [those] inclined to discriminate,⁶⁸ and “must show that [those] facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.”⁶⁹ *Batson* instructs trial judges to consider all relevant circumstances, including the pattern of strikes and the questions and statements made by the prosecutor during the jury selection process, in determining whether the defendant has established a *prima facie* case.⁷⁰

Citing, and creating a formal symmetry to, the venire selection cases, the opinion then declares that upon the establishment of a *prima facie* case, the burden shifts to the state to come forward with a neutral explanation for disparate results.⁷¹ While the explanation for the challenge need not rise to the level justifying exercising a challenge for cause, it may not rest upon a judgment that the venirepersons would be partial to the defendant because of their shared race.

Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids

65. *Id.* at 97.

66. *Id.* at 95 (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 n.14 (1977)).

67. *Id.* at 96.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 97.

the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.⁷²

Nor can the state's burden be satisfied by unadorned denials of discriminatory motives and assertions of good faith.⁷³ Having declared the new right and the standards by which claims that the right had been denied should be judged, the Court declined to go further and formulate procedures for implementing these standards.

Despite the overthrow of *Swain* and the prominent citation of venire selection cases, *Batson* did not bring the peremptory challenge cases in line with the old venire selection cases. If congruence was achieved, it was only through the muddying of the venire selection waters. *Batson* stated clearly that the principles that forbid discrimination in the selection of the venire "also forbid discrimination on account of race in selection of the petit jury"⁷⁴ But what are those principles? Rather than emphasizing the risk of prejudicial determinations by racist white juries as *Strauder* quite clearly did,⁷⁵ the *Batson* Court glossed over the nature of the harm that black defendants suffer when black people are excluded from the jury on the basis of their race.

Batson did hold that discriminatory jury selection violates the defendant's right to equal protection "because it denies him the protection that a trial by jury is intended to secure."⁷⁶ But after describing the institution of the jury and its importance,⁷⁷ the Court said only that "[t]hose on the venire must be 'indifferently chosen' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'"⁷⁸ With no further explanation, the Court abandoned the question of black defendants' interests, and moved on to other harms.

72. *Id.* (citation omitted).

73. *Id.*

74. *Id.* at 88.

75. See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (invalidating a West Virginia statute, which excluded black jurors, as violative of equal protection).

76. *Batson*, 476 U.S. at 86.

77. *Id.* at 86-87.

78. *Id.* (quoting *Strauder*, 100 U.S. at 309).

In *Batson*, the Court addressed both the “unconstitutional discriminat[ion] against the excluded juror”⁷⁹ and the harm to the “entire community”⁸⁰ In its discussion of the harm to the excluded juror, the Court overstated precedent by claiming that “[a]s long ago as *Strauder* the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated *against the excluded juror*”⁸¹ Turning to the harm inflicted on the entire community, the Court explained that racially exclusionary practices “undermine public confidence in the fairness of our system of justice.”⁸² Again citing *Strauder*, the Court declared that “[d]iscrimination within the judicial system is most pernicious because it ‘is a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.’”⁸³ But in *Strauder* itself, the paraphrased language read “individuals of the race,”⁸⁴ and clearly referred to the black defendants whose right the Court was analyzing! Moreover, when the Court later turned to justifying the burdens the decision will place on trial courts, it did not refer to the defendant at all, but reiterated the public perception theme. “In view of the heterogenous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”⁸⁵

Thus, *Batson* underplays prior rationales relating to the defendant’s interest in nonracist determinations of his guilt and exaggerates precedent related to juror rights and community interests. The terms of the Court’s holding quite carefully refer to the right of the criminal defendant to challenge the exclusion of “members of his race.”⁸⁶ This language suggests a rationale that matches that of the venire selection cases: protecting the criminal defendant against racial bias. Yet the explication of the Court’s reasoning is

79. *Id.* at 87.

80. *Id.* at 87-88.

81. *Id.* at 87 (emphasis added).

82. *Id.*

83. *Id.* at 87-88 (quoting *Strauder*, 100 U.S. at 308) (paraphrasing in original).

84. *Strauder*, 100 U.S. at 308.

85. *Batson*, 476 U.S. at 99.

86. *Id.* at 82.

murky on this point. Because the murkiness is not a product of prior case law, one suspects it is deliberate.

2. *Justice Marshall's Concurrence*

Justice Marshall concurred in the Court's conclusion that racially-motivated exercise of the peremptory challenge violates the Equal Protection Clause,⁸⁷ but argued that the remedy the Court proposed was inadequate to eliminate the prohibited discrimination.⁸⁸ After reviewing data on the frequency with which the challenge had been exercised on racial grounds⁸⁹ and cases from states that had adopted an evidentiary analysis similar to the Court's as a matter of state law,⁹⁰ Marshall concluded that the remedial analysis was flawed in two ways.⁹¹ First, he predicted that defendants often would fail to establish a prima facie case even when the prosecutor had engaged in race-based behavior because the limited number of minorities on the jury would make a sufficiently "flagrant" case impossible.⁹² Thus, prosecutors would remain free to discriminate against minorities in jury selection "provided that they hold that discrimination to an 'acceptable' level."⁹³

Marshall's second objection was that even when a prima facie case could be established, trial courts would not be capable of reliable assessment of the prosecutor's motives.⁹⁴ Facially neutral reasons for striking a juror are easy to assert and difficult to second-guess.⁹⁵ Again citing state court examples, Marshall reasoned that if flimsy explanations about speculated family relationships, demeanor, or general impression were sufficient to justify strikes, then the protection announced by the Court could be illusory.⁹⁶ Moreover, it is not only law-breaking prosecutors who threaten the announced right, but self-deceiving ones:

87. *Id.* at 102 (Marshall, J., concurring).

88. *Id.* at 102-03.

89. *Id.* at 103-04.

90. *Id.* at 105.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 106.

96. *Id.*

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.⁹⁷

These obstacles led Marshall to propose the elimination of the peremptory challenge as the only effective means of preventing racial discrimination in jury selection.⁹⁸ The majority's response to Marshall's concerns and his proposal is contained in a relatively brief footnote, which expressed confidence in judges and prosecutors and concluded: "[n]or do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution."⁹⁹ The majority did not respond to Marshall's telling rejoinder that, "[e]ven if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet."¹⁰⁰

Marshall did not explicitly clarify or augment the majority rationale, but his opinion suggests a greater degree of concern for just results than does the majority opinion. In part, this greater concern is evident from the fact that superficially fair challenges, ones that do not so obviously demean the juror or create the *impression* of injustice, trouble Marshall while they do not seem to disturb the majority. The other evidence that his animating concern is for unbiased determinations of guilt lies in his comments about the defense's use of peremptory challenges. Marshall noted that the "potential for racial prejudice" inheres in the defendant's challenge as well as the prosecutor's,¹⁰¹ and argued that "[o]ur criminal justice system 'requires not only freedom from any bias

97. *Id.*

98. *Id.* at 107.

99. *Id.* at 99 n.22.

100. *Id.* at 106 (Marshall, J., concurring).

101. *Id.* at 108.

against the accused, but also from any prejudice against his prosecution.’ ”¹⁰²

3. *The Dissents*

The dissents in *Batson* sailed a quite opposite tack. Chief Justice Burger argued for the correctness of *Swain*.¹⁰³ He noted the importance of the peremptory challenge¹⁰⁴ and the inapplicability of “unadulterated equal protection analysis” to peremptory challenges exercised in a particular case.¹⁰⁵ He reasoned that notions of rationality cannot be applied to “ ‘an arbitrary and capricious right’ ”¹⁰⁶ and that “a constitutional principle that may invalidate state action on the basis of ‘stereotypic notions’ does not explain the breadth of a procedure exercised on the ‘sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.’ ”¹⁰⁷

Burger’s opinion also made a slippery slope argument. He contended that if equal protection analysis is applied in the case it must also be applied to challenges based on classifications other than race and to challenges exercised by defense counsel—results he considered extremely undesirable.¹⁰⁸ Burger further complained of “the return of racial differentiation” as “[p]rosecutors and defense attorneys alike will build records in support of their claims . . . by asking jurors to state their racial background and national origin for the record, despite the fact that ‘such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire.’ ”¹⁰⁹ Apparently Burger believed that racially differentiating *action* is not problematic; but rather, it is *speaking* the word that is costly.

Justice Rehnquist’s dissent pointed out that neither the majority nor the dissent in *Swain* doubted that case-specific use of race was

102. *Id.* at 107 (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)).

103. *Id.* at 112 (Burger, C.J., dissenting).

104. *Id.* at 121-23.

105. *Id.* at 123.

106. *Id.* (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)).

107. *Id.* (citations omitted).

108. *Id.* at 124.

109. *Id.* at 129 (quoting *People v. Motton*, 704 P.2d 176, 180 (Cal. 1985)).

constitutional.¹¹⁰ In his view, a view that resonates to this reader with the old "equal application"¹¹¹ and "separate but equal"¹¹² doctrines,

there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on.¹¹³

"Indeed," he wrote, "given the need for reasonable limitations on the time devoted to *voir dire*, the use of [group affiliations as] 'proxies' [for potential juror partiality] by both the State and the defendant may be extremely useful"¹¹⁴ Of course, permitting such "useful" reciprocal discrimination would have wildly unequal results. Given the majority status of whites, it would be the rare case in which a prosecutor could use peremptory challenges to ensure that a white defendant faced a jury from which all whites had been excluded. Whether this inescapable fact did not occur to or did not matter to Justice Rehnquist is not clear.

D. *The "Breadth" of Batson: Powers, Edmonson, and McCollum*

The Burger and Rehnquist Courts are known neither for their expansion of criminal procedure rights,¹¹⁵ nor for their activism on the racial justice/equal protection front (at least not when minorities' equal protection rights are involved).¹¹⁶ For those on the left,

110. *Id.* at 135 (Rehnquist, J., dissenting).

111. *See Loving v. Virginia*, 388 U.S. 1 (1967) (rejecting the equal application doctrine in a case involving a statutory scheme to prevent interracial marriages).

112. *See Brown v. Board of Educ.*, 349 U.S. 294 (1955) (rejecting the separate but equal concept as applied to racially segregated schools).

113. *Batson*, 476 U.S. at 137-38 (Rehnquist, J., dissenting). Eventually, the Court explicitly rejected this argument on the ground that "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991).

114. *Batson*, 476 U.S. at 138-39 (Rehnquist, J., dissenting) (footnote omitted).

115. For example, both Courts have restricted the federal habeas corpus remedy. *See Coleman v. Thompson*, 111 S. Ct. 2546 (1991) (Rehnquist Court); *Engle v. Isaac*, 456 U.S. 107 (1982) (Burger Court).

116. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (limiting the availability of race-based remedial action).

Batson is the bright spot in both fields, and, despite the two Chief Justices' objections, it has spread like a brushfire.¹¹⁷

It is true that the Court initially cabined the peremptory challenge cases to the Equal Protection Clause. In the 1990 case of *Holland v. Illinois*,¹¹⁸ the Court found that the Sixth Amendment did not prohibit racially motivated exercises of the peremptory challenge.¹¹⁹ Holland was a white defendant who objected to the exclusion of black venirepersons,¹²⁰ but his choice of doctrine, and not his race, thwarted his claim. In *Holland*, five members of the Court suggested that Holland might have prevailed had he raised an equal protection challenge,¹²¹ and in *Powers v. Ohio*,¹²² decided the following year, seven members of the Court so held.¹²³

1. *Powers v. Ohio*

The majority in *Powers* first observed that *Batson* was intended to serve several ends, "only one of which was to protect individual defendants from discrimination in the selection of jurors."¹²⁴ *Batson*, according to the *Powers* majority, also recognized harms to the excluded jurors and to the community.¹²⁵ This characterization of *Batson*, hotly disputed by the dissent, prefaced the Court's holding that peremptory challenges based on race violate the venireperson's equal protection right not to be excluded from jury service on the basis of race.¹²⁶ The Court concluded that the crimi-

117. See, e.g., *Powers v. Ohio*, 111 S. Ct. 1364 (1991) (holding that a white defendant could object to race-based exclusions of black jurors under the Equal Protection Clause).

118. 493 U.S. 474 (1990).

119. *Id.* at 478.

120. *Id.* at 475.

121. See *id.* at 488 (Kennedy, J., concurring); *id.* at 490 (Marshall, J., dissenting); *id.* at 504 (Stevens, J., dissenting).

122. 111 S. Ct. 1364 (1991).

123. *Id.* (Kennedy, J., delivering the majority opinion and joined by Justices White, Marshall, Blackmun, Stevens, O'Connor and Souter).

124. *Id.* at 1368 (citing *Allen v. Hardy*, 478 U.S. 255, 259 (1986)).

125. *Id.*

126. *Id.* at 1370 ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."). Cf. *id.* at 1379 (Scalia, J., dissenting) (disputing the existence of a juror's right not to be excluded from a jury on the basis of race).

nal defendant, regardless of race, satisfies the three criteria for third party standing to assert the venireperson's claim.¹²⁷

Two of the criteria for third party standing are relatively unproblematic. First, the criminal defendant has the requisite "close relation to the third party" that motivates effective advocacy because discrimination in the jury process selection may lead to reversal of the defendant's conviction.¹²⁸ Second, the third party is hindered from protecting her own rights because of the impossibility of being heard at the time of her exclusion.¹²⁹

More problematic, as Justice Scalia argued in dissent, is the "injury in fact" requirement.¹³⁰ The majority found this requirement met because "[t]he overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."¹³¹ Whether or not one approves of the outcome in *Powers*, it must be acknowledged that this somewhat stretches the "injury in fact" standard.¹³² One suspects that a very large number of litigants who have been denied third party standing could have made an analogous claim. As Justice Scalia phrased it,

Every criminal defendant objecting to the introduction of some piece of evidence or to some trial procedure on the ground that it violates the rights of a third party can claim a similar "perception of unfairness," but we deny standing. "Injury in perception" would seem to be the very *antithesis* of "injury in fact."¹³³

127. *Id.* at 1370-74.

128. *Id.* at 1372.

129. *Id.* at 1373. The Court also noted the difficulty of obtaining declaratory or injunctive relief given the requirement of a showing of likely recurrence of the individual juror's exclusion based on race and the prohibitive costs of a damages suit given the small financial stake involved. *Id.*

130. *See id.* at 1379-81 (Scalia, J., dissenting).

131. *Id.* at 1371.

132. *See* Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 433 (1992) (approving of the result in *Powers*, but characterizing the opinion as "aggressive resort to third-party standing"). For comment on the generally restrictive nature of third party standing law, see Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981).

133. *Powers*, 111 S. Ct. at 1379 (Scalia, J., dissenting).

To my mind, the unspoken conundrum for the majority was how to avoid the cost of recognizing the *real* injury. There is real injury to the defendant, but part of the murky reasoning of *Batson* might seem to preclude its acknowledgement. The prosecutor struck the black juror and the defense objected to that strike because *both* sides were convinced that a black juror would be more favorable to the defendant. The real injury is the loss of that presumptively more favorable juror. But *Batson* states that the Equal Protection Clause forbids a strike premised on the assumption that black venirepersons "will be biased in a particular case simply because the defendant is black."¹³⁴ The meaning and purpose of that statement must be dissected. If it is a specific example of the more general principle that *any* inference about a juror's likely bias based on her race is both false and constitutionally impermissible, then the lost juror in *Edmonson*¹³⁵ cannot be characterized as presumptively favorable.

The other plausible interpretation of that statement from *Batson* would not preclude recognizing the real injury, but it has its own costs. If the statement means only what it says—that black jurors may not be deemed biased in cases involving black defendants—that may be because it is *white* jurors who can and should be deemed biased, or who are at least at greater risk of being biased, in cases involving black defendants. This interpretation comports with the earlier venire selection cases, but requires a definitive choice of rationale, a choice the Court in *Batson* seemed reluctant to make. It is also in some tension with the Court's repeated statements that the defendant is not entitled to a jury of any particular composition. I will turn to that tension in Part IV, but note for now that a satisfactory response to Justice Scalia would require directly confronting that tension. The somewhat strained construction of injury-through-perception avoids that unpleasant prospect, at least for the moment.

Thus, *Batson* purported to offer new protection to defendants, protection from prosecutorial action that excludes racially similar jurors on the basis of their shared race. *Powers* supposedly protected jurors from exclusion on the basis of their race, and at least

134. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

135. See *infra* part II.D.2.

at first glance, *Powers* seemed to have the effect of expanding the defendant's *Batson* right to encompass all exclusions of jurors based on race. But the contortions of *Powers* are disquieting, for reasons that become clearer with the subsequent cases.

2. *Edmonson v. Leesville Concrete Company*

I now depart from the chronological sequence of the cases, postponing discussion of *Hernandez v. New York*.¹³⁶ I do this largely because *Edmonson v. Leesville Concrete Co.*¹³⁷ and *Georgia v. McCollum*,¹³⁸ like *Powers*, but unlike *Hernandez*, can be deemed an "expansion" of *Batson*. Just as third party standing doctrine was used to "broaden" *Batson* to cover the racially motivated prosecutorial exclusion of racially *dissimilar* jurors, state action doctrine has been used to "broaden" *Batson* beyond its original application to *prosecutors'* challenges.¹³⁹

The *Batson* majority was careful to note that it was expressing no view on whether the Equal Protection Clause constrained the exercise of peremptory challenges by defense counsel.¹⁴⁰ Before the Court addressed that issue directly, it decided *Edmonson*,¹⁴¹ determining that a private litigant in a civil case may not use peremptory challenges to exclude jurors on the basis of their race.¹⁴² Private parties, of course, ordinarily are not constrained by the Equal Protection Clause,¹⁴³ but where the government so dominates an activity that the participants must be deemed to act with the authority of the government, those parties are subject to the constraints applicable to the government.¹⁴⁴ The first requirement for finding state action, that the claimed constitutional deprivation resulted from the exercise of a right or a privilege having its source

136. 111 S. Ct. 1859 (1991).

137. 111 S. Ct. 2077 (1991).

138. 112 S. Ct. 2348 (1992).

139. *Edmonson*, 111 S. Ct. at 2077 (addressing an action by a private party rather than an explicit "state action").

140. *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986).

141. 111 S. Ct. 2077 (1991).

142. *Id.* at 2077.

143. *See id.* at 2082 ("The Constitution's protections of individual liberty and equal protection apply in general only to action by the government.").

144. *Id.*

in state authority,¹⁴⁵ the Court found easily satisfied, reasoning that peremptory challenges owe their existence to legislative authorizations.¹⁴⁶ Regarding the second requirement, that the private party could fairly be described as a state actor,¹⁴⁷ the Court concluded that a civil litigant's attorney exercising a peremptory challenge could be so described.¹⁴⁸ In support, the Court cited the "overt, significant" participation of the government in jury selection,¹⁴⁹ the quintessentially governmental nature of the jury system,¹⁵⁰ and the exacerbation of injury due to its location in a courthouse.¹⁵¹

Justice O'Connor's dissent, joined by Chief Justice Rehnquist and Justice Scalia, first noted with regret the disarray of the state action cases,¹⁵² and then disputed both the assertion that the government participates in a significant way in the peremptory challenge¹⁵³ and the claim that a traditional governmental function is involved.¹⁵⁴ O'Connor narrowed the lens, and argued that the government's participation in the peremptory challenge itself is limited to the judge advising a juror that he or she has been excused.¹⁵⁵ The evidence of the government's participation in the rest of the jury selection process she deemed irrelevant.¹⁵⁶ Similarly, she argued that the peremptory challenge, as opposed to the functioning of the jury system as a whole, should be examined in determining the presence of a traditional governmental function.¹⁵⁷ This narrowed focus led her to find the challenge an obviously private function.¹⁵⁸ After careful comparisons to other recent state action

145. *Id.* at 2082-83 (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)).

146. *Id.* at 2083.

147. *Id.* (citing *Lugar*, 457 U.S. at 941-42).

148. *Id.*

149. *Id.* at 2084 (quoting *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478 (1988)).

150. *Id.* at 2085.

151. *Id.* at 2087.

152. *Id.* at 2089 (O'Connor, J., dissenting).

153. *Id.*

154. *Id.*

155. *Id.* at 2090.

156. *Id.*

157. *See id.* at 2092-94.

158. *Id.*

cases, most of which the majority did not address,¹⁵⁹ O'Connor deemed the case "fairly well controlled"¹⁶⁰ by *Polk County v. Dodson*.¹⁶¹ In *Polk County*, the Court held that a public defender employed by the state does not act under color of state law when representing a defendant in a criminal trial.¹⁶²

The digression of a lengthy analysis of state action doctrine is not necessary. It suffices to say that, while a reader predisposed toward the outcome in *Edmonson* might find it a permissible ruling under the prior state action cases, she would be hard pressed to maintain that those cases mandated it.¹⁶³ Again we see *Batson* spreading in a way that neither the logic of *Batson* itself nor precedent from other doctrinal areas would seem to require.

Edmonson has one other interesting aspect. Despite the fact that Edmonson was black and the jurors whose exclusion he challenged were black,¹⁶⁴ the Court analyzed the case as a denial of the *venueperson's* rights,¹⁶⁵ concluding that civil parties also had a sufficient interest in the outcome of the proceeding to warrant third party standing.¹⁶⁶ The *only* right the majority discussed was the prospective juror's right, and any right as a litigant—the right that the *Batson* holding recognized and the right with a century-long pedigree—had disappeared. If *Powers* appeared to expand the *Batson* right, after *Edmonson* it seems more precise to describe the right as transformed. That the transformation was not without cost becomes more apparent in the next state action case, *Georgia v. McCollum*.¹⁶⁷

159. *Id.* at 2093-94.

160. *Id.* at 2094.

161. 454 U.S. 312 (1981).

162. *Id.*

163. See Neuborne, *supra* note 132, at 447 (approving the result in *Edmonson*, but describing Justice Kennedy's opinion as not compelled by the state action case law, but "swim[ming] against the formal current").

164. *Edmonson*, 111 S. Ct. at 2081.

165. *Id.* at 2080.

166. *Id.* at 2088.

167. 112 S. Ct. 2348 (1992).

3. *Georgia v. McCollum*

In *McCollum*, the State charged the white defendants with a racially motivated assault on two African Americans.¹⁶⁸ When the State moved to prevent the defendant from exercising peremptory challenges in a racially discriminatory manner, the trial court denied the motion, but certified an immediate appeal.¹⁶⁹ The Supreme Court of Georgia affirmed the trial court's decision, distinguishing *Edmonson* as a civil case, and relying on the importance of the free exercise of the peremptory challenge to protect criminal defendants.¹⁷⁰ The United States Supreme Court reversed, holding that the Equal Protection Clause "prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges."¹⁷¹

The majority opinion in *McCollum* addressed four questions.¹⁷² The first question was "whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*."¹⁷³ Citing *Powers* as support for the proposition that *Batson* was intended to serve multiple ends, only one of which was protection of defendants from discrimination,¹⁷⁴ the Court determined that "the extension of *Batson* in this context is designed to remedy the harm done to the 'dignity of persons' and to the 'integrity of the courts.'"¹⁷⁵ The Court reasoned that regardless of who challenges the juror, the harm is the same; the juror is subjected to "open and public racial discrimination."¹⁷⁶ Primary attention, however, went to the harm to the community.¹⁷⁷ The Court reasoned that one of the goals of the jury system is to impress on the defendant and the community that a verdict is lawful and fair, and that selection procedures that exclude African

168. *Id.* at 2351.

169. *Id.* at 2352.

170. *Id.*

171. *Id.* at 2359.

172. *Id.* at 2353.

173. *Id.*

174. *Id.*

175. *Id.* (quoting *Powers v. Ohio*, 111 S. Ct. 1364, 1366 (1990)).

176. *Id.*

177. *Id.* (citing *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)).

Americans from juries undermine that public confidence.¹⁷⁸ Moreover, the “need for public confidence is especially high in cases involving race-related crimes.”¹⁷⁹ Because “emotions in the affected community will inevitably be heated and volatile[, p]ublic confidence in the integrity of the criminal justice system is essential for preserving community peace”¹⁸⁰ The Court then cited an article describing the “public outrage and riots” that followed the trial of two white defendants accused of a racial beating who were acquitted by a jury from which all African American jurors had been struck.¹⁸¹ With these remarks, the Court completed the evolution away from the root concern of racial justice to the distant fruit of the *appearance* of justice, seemingly important now for its law and order function.

To answer the second question, whether the defendant properly can be considered a state actor when she exercises the peremptory challenge,¹⁸² the Court turned to the rationale used in *Edmonson* to find the private litigant exercising peremptory challenges to be a state actor.¹⁸³ The Court scored the criminal defendant the same on all three of the *Edmonson* criteria, the extent of reliance on governmental benefits, the performance of a traditional function, and the aggravation of the injury by the incidents of governmental authority.¹⁸⁴ The Court then determined that the adversarial relationship between the defendant and the prosecution does not negate the governmental character of the challenge.¹⁸⁵ It distinguished the *Polk County* public defender case¹⁸⁶ by explaining that the Court in *Polk County* had not held that the adversarial relationship completely precluded the finding of state action, but only determined that the relationship precluded a finding of state action based upon public employment alone.¹⁸⁷

178. *Id.* at 2353-54.

179. *Id.* at 2354.

180. *Id.*

181. *Id.* (citing Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 195-96 (1989)).

182. *Id.* at 2355.

183. *Id.* (citing *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1991)).

184. *Id.* at 2355-56.

185. *Id.* at 2356.

186. *Polk County v. Dodson*, 454 U.S. 312 (1981).

187. *McCollum*, 112 S. Ct. at 2356-57.

The third question addressed by the Court in *McCullum* was whether the prosecutor had standing to raise the claims of the potential jurors.¹⁸⁸ The Court answered that the state incurs harm when doubt is cast upon the fairness of its judicial process.¹⁸⁹ Again, as in *Powers* and *Edmonson*, the harm to the state is the *perceived* injustice and not an unjust outcome. The Court reasoned that the state's connection to the jurors is sufficiently close because it is the "logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial."¹⁹⁰ Moreover, as in *Edmonson* and *Powers*, the Court found that "the barriers to suit by an excluded juror are daunting," thus precluding her from raising her own claim.¹⁹¹

Finally, the Court asked "whether the interests served by *Batson* must give way to the rights of a criminal defendant,"¹⁹² and concluded that they need not.¹⁹³ After noting that the peremptory challenge does not have constitutional status,¹⁹⁴ the Court opined that its decision would not "undermine the contribution of the peremptory challenge to the administration of justice."¹⁹⁵ In sharp contrast to its earlier remarks on the importance of public perceptions of fairness,¹⁹⁶ the Court declared that " 'if race stereotypes are the price for acceptance of a jury panel as fair' ' [that] price is too high to meet the standard of the Constitution.' "¹⁹⁷ With indignation, the Court then announced that "[i]t is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race."¹⁹⁸

Without alluding to the objection it was addressing, the Court then offered the following lecture:

188. *Id.* at 2357.

189. *Id.*

190. *Id.*

191. *Id.* (quoting *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991)).

192. *Id.* at 2357-58.

193. *Id.* at 2358.

194. *Id.*

195. *Id.*

196. *Id.* at 2357; see also *supra* note 189 and accompanying text.

197. *McCullum*, 111 S. Ct. at 2358 (quoting *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088 (1991)).

198. *Id.* at 2358.

We recognize, of course, that a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice. We have, accordingly, held that there should be a mechanism for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism.¹⁹⁹

The reader who is familiar with the line of cases the Court cited must protest that these remarks are disingenuous at best. Though a mechanism exists for “removing those whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism,”²⁰⁰ this mechanism, voir dire on racial prejudice, generally is not available to the defendant!²⁰¹ The Court cited *Ham v. South Carolina*,²⁰² a 1973 case in which it held that a bearded black civil rights worker charged with possession of marijuana was deprived of due process when the trial court refused to question the panel concerning racial prejudice.²⁰³ The Court in *McCollum* failed to mention the severe limitations subsequently imposed on this right.

In *Ristaino v. Ross*,²⁰⁴ the Court ruled that *Ham* did not announce a universally applicable rule, but “reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be [impartial].”²⁰⁵ The fact that Ross was a black man accused of committing violent crimes against a police officer “did not suggest a significant likelihood that racial prejudice might infect Ross’ trial”²⁰⁶ and thus did not require a question concerning racial prejudice.²⁰⁷ In *Turner v. Murray*,²⁰⁸ the Court reaffirmed this holding with regard to guilt

199. *Id.* at 2358-59 (citing *Morgan v. Illinois*, 112 S. Ct. 2222 (1992); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *Ham v. South Carolina*, 409 U.S. 524 (1973)).

200. *Id.*

201. *See, e.g., id.* at 2361-63 (O'Connor, J., dissenting).

202. 409 U.S. 524 (1973).

203. *Id.* at 525-26, 529.

204. 424 U.S. 589 (1976).

205. *Id.* at 596.

206. *Id.* at 598.

207. *Id.*

208. 476 U.S. 28 (1986).

adjudications, including capital cases, and modified *Ross* only to the extent of requiring voir dire on racial prejudice *in a capital sentencing proceeding* in which the underlying offense was an interracial one.²⁰⁹ Thus, the constitutionally-mandated right to voir dire on racial prejudice is extremely narrow. Moreover, even when voir dire is required, it may be ineffective in probing racial bias because questions generally are sharply limited in number and sometimes are addressed to the entire venire rather than to individual jurors.²¹⁰

The Court also cited *Rosales-Lopez v. United States*,²¹¹ a case of little practical importance. In *Rosales-Lopez*, a federal supervisory power case, the Court *denied* relief to a defendant requesting voir dire on prejudice against persons of Mexican descent in an illegal immigration case.²¹² The minimal protection provided by *Rosales-Lopez* derived from the plurality's view that *in the federal courts, as a matter of federal supervisory power*, in cases involving violent interracial crimes, a question concerning racial prejudice should be permitted.²¹³

Why did the Court make this dubious foray into voir dire law? The Court in *McCollum* continued its lecture:

But there is a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice. This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. As this Court stated just last Term in *Powers*, "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns." "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." We therefore reaffirm today that the exercise of a peremptory challenge must not be based

209. *Id.* at 33-38.

210. See generally Johnson, *supra* note 50, at 1674-75 (noting cases and commentary).

211. 451 U.S. 182 (1981).

212. *Id.* at 183, 194.

213. See *id.* at 189.

on either the race of the juror or the racial stereotypes held by the party.²¹⁴

The most interesting, disturbing, disheartening, and outrageous aspect of this paragraph is its apparent resolution of one of the ambiguities in *Batson*. *Batson* repeatedly referred to the impermissibility of a presumption that black jurors were biased in favor of black defendants.²¹⁵ Here the Court generalized to the impermissibility of assuming *any* juror is more likely to be biased on account of her race. This explicit generalization, foreshadowed by *Edmonson*'s adoption of an injury-in-perception theory of the harm to the litigant,²¹⁶ seems to encompass the disapproval of all assumptions about the prevalence of bias in white jurors.

The concurrence of Justice Thomas²¹⁷ and the dissent of Justice O'Connor²¹⁸ voice the objection to which the majority's lecture had responded. It was not the particular facts of *McCollum*—white defendants seeking to strike black venirepersons—that the majority was attempting to ward off with its words, but rather the looming shadow of the next case, indeed the looming shadow of white racism. Justice O'Connor's dissent actually posed a less drastic disagreement than Justice Thomas' concurrence. She accepted the correctness of *Batson*, but reiterated her dissent in *Edmonson*.²¹⁹ She also asserted that even if *Edmonson* was not to be overruled, *McCollum* was distinguishable for the reasons set out in *Polk County v. Dodson*.²²⁰ The adversarial relationship between the government and the accused precludes finding the accused a state actor.²²¹ O'Connor noted that *Dodson* quite specifically stated that public defenders are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a crimi-

214. *McCollum*, 112 S. Ct. at 2359 (alterations in original) (quoting *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991); *Ristano v. Russ*, 424 U.S. 589, 596 n.8 (1976)).

215. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

216. See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087-88 (1991).

217. *McCollum*, 112 S. Ct. at 2359-61 (Thomas, J., concurring).

218. *Id.* at 2361-65 (O'Connor, J., dissenting).

219. *Id.* at 2361-63.

220. 454 U.S. 312 (1981).

221. *McCollum*, 112 S. Ct. at 2361-63 (O'Connor, J., dissenting).

nal proceeding,"²²² a holding that clearly encompasses the exercise of the peremptory challenge.²²³

Justice O'Connor then observed that "[w]hat really seems to bother the Court is the prospect that leaving criminal defendants and their attorneys free to make racially motivated peremptory challenges will undermine the ideal of nondiscriminatory jury selection we espoused in *Batson*."²²⁴ She objected that this preoccupation ignores the fundamental tenet that the Constitution only constrains the government,²²⁵ and then noted the "pragmatic" objection that the Court's holding may "fail to advance nondiscriminatory criminal justice."²²⁶

Justice O'Connor either mistook or disagreed with the majority's conception of "nondiscriminatory criminal justice." She focused on outcomes, not procedures, declaring that conscious and unconscious racism can affect the way in which white jurors perceive minority defendants and evidence concerning those defendants' guilt.²²⁷ Thus she reasoned that the use of peremptory challenges by a minority defendant to secure some minority representation on the jury "may help to overcome such racial bias, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury."²²⁸ Quoting the amicus curiae brief filed by the NAACP Legal Defense Fund,²²⁹ O'Connor observed that some minority defendants may be denied all minority jurors unless they are able to use their peremptories to strike members of the majority race.²³⁰ Explicitly focusing on outcome, she concluded that "[i]n a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions."²³¹

222. *Id.* at 2361 (quoting *Polk County v. Dodson*, 454 U.S. 312, 325 (1981)).

223. *Id.* at 2362.

224. *Id.* at 2363-64 (citation omitted).

225. *Id.* at 2364.

226. *Id.*

227. *Id.*

228. *Id.* (citations omitted).

229. *Id.*

230. *Id.*

231. *Id.*

Justice Thomas, concurring in the judgment,²³² ventured a more radical disagreement. He agreed that *Edmonson* compelled the majority's decision,²³³ but wrote to express his broad disagreement with the Court's continuing attempts to constitutionally regulate peremptory challenges.²³⁴ The course of his opinion suggests that his disagreement extends beyond *Edmonson* to *Batson* itself.

Thomas started with *Strauder's* premise that the racial composition of a jury may affect the outcome of a particular case.²³⁵ That premise implies that "securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial."²³⁶ Because conscious and unconscious prejudice persists in society, Thomas asserted that *Strauder's* premise is not obsolete.²³⁷ Thomas then noted that *Batson* departed from that premise by holding that "without some actual showing, suppositions about the possibility that jurors may harbor prejudice have no legitimacy"²³⁸ Ultimately, this departure results in "a serious misordering of our priorities,"²³⁹ putting the rights of jurors foremost, and leaving defendants with no means of protecting themselves from unacknowledged racial prejudice.²⁴⁰

Thomas noted the NAACP's amicus argument that "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority jurors,"²⁴¹ but commented "it is difficult to see how the result could be different if the defendants here were black."²⁴² Thomas was therefore "certain that black criminal defendants will rue the day that this court [sic] ventured down this

232. *Id.* at 2359-61 (Thomas, J., concurring).

233. *Id.* at 2359.

234. *Id.*

235. *Id.* at 2360 (citing *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)).

236. *Id.* (citation omitted).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 2360 n.2 (quoting Brief for NAACP Legal Defense and Educational Fund, Inc. at 3-4).

242. *Id.* at 2360 n.2.

road that inexorably will lead to the elimination of peremptory strikes."²⁴³

In some ways, *McCollum* is but a small step from *Edmonson*. Although the Court assigned itself four questions, only two could have been decided differently given *Edmonson*. Moreover, two Justices unpersuaded by *Edmonson*, Chief Justice Rehnquist and Justice Thomas, deemed it controlling on all questions.²⁴⁴ Yet because *McCollum* makes the evolving inversion of priorities explicit, it is significant. Faced with the choice between juror rights and defendant rights, the majority did not blink.

That black defendants as a class will "rue the day" the Court decided *Batson* seems unlikely. If few prosecutors were exercising peremptory challenges before *Batson* was decided, then, as a class, black defendants indeed will be worse off than they were under *Swain*,²⁴⁵ for then their attorneys were free to seek more, or at least some, black jurors by striking white jurors. If, however, many prosecutors exercised their challenges to strike black jurors, as extensive evidence suggests,²⁴⁶ then, as a class black defendants should be better off under *Batson* cum *McCollum* than under *Swain*. Because most venire populations are not predominantly black, when a prosecutor and a black defendant's attorney with an equal number of challenges are allowed to attempt to racially stack the venire, most often it is the defendant who comes up short.

Obviously, what would be most beneficial for black defendants as a class, indeed, for defendants generally, would be *Batson* without *McCollum*, as O'Connor advocates.²⁴⁷ In any event, it is a strange case that makes Justices O'Connor and Thomas the champions of defendant rights and the purveyors of discussion about unconscious racism.

243. *Id.* at 2360.

244. *See id.* at 2359 (Rehnquist, C.J., concurring) ("I was in dissent in *Edmonson v. Leesville Concrete Co.* But so long as it remains the law, I believe that it controls the disposition of this case.") (citation omitted).

245. *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

246. *See infra* note 358 and accompanying text.

247. *McCollum*, 112 S. Ct. at 2361-63 (O'Connor, J., dissenting); *see also supra* notes 218-226 and accompanying text.

E. The Depth of Batson: Hernandez v New York

The foregoing analysis assumes that *Batson* is an effective prohibition of racially motivated peremptory challenges, the assumption that Justice Marshall decried in his concurrence in *Batson*.²⁴⁸ One would expect that the Court, determined despite doctrinal obstacles to apply a new rule to every trial in the entire legal system, would be deeply invested in defining that rule. The Supreme Court, however, has been interested much less in the application of *Batson* than its applicability. *Hernandez v. New York*²⁴⁹ is the only Supreme Court case that applies the *Batson* rule to a specific fact pattern. Its outcome underscores the aptness of the brushfire metaphor; *Batson* spread quickly and broadly, but what it burned was insubstantial.

In the midst of the “expansionist” post-*Batson* cases, came a case that only can be deemed a severe contraction.²⁵⁰ After the prosecutor had excused the only four potential jurors with Latino surnames, defense counsel for Hernandez moved for a mistrial, alleging discrimination under *Batson*.²⁵¹ The prosecutor, without waiting for a ruling on whether the defendant had established a prima facie case of discrimination, offered his reasons for striking the jurors.²⁵² With respect to two of the prospective jurors, he explained that they had brothers who had been convicted of crimes, an explanation Hernandez did not dispute.²⁵³

Concerning the other two, after first asserting that he was “not certain” that they were Hispanics, the prosecutor stated that his reason for rejecting them was that he felt uncertain that they would be able to listen to and follow the interpreter.

They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the in-

248. *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

249. 111 S. Ct. 1859 (1991).

250. The Court decided *Hernandez* less than a week before *Edmonson*.

251. *People v. Hernandez*, 552 N.E.2d 621, 622 (N.Y. 1990), *aff'd*, 111 S. Ct. 1859 (1991).

252. *Hernandez*, 111 S. Ct. at 1864.

253. *Id.*

terpreter will be for the main witnesses, they would have an undue impact upon the jury.²⁵⁴

Later the prosecutor acknowledged that the jurors' "final answer" was that they would listen only to the interpreter, but that he "just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it."²⁵⁵ After the trial court denied the defense counsel's motion, the prosecutor added that "there's no reason for me to want to exclude Hispanics because all the parties involved are Hispanic, and I certainly would have no reason to do that."²⁵⁶ When defense counsel then charged that the prosecutor had excluded Latino jurors based on fear that they would have sympathized with the defendant, the judge responded by noting that the victims' ethnicity argued against that inference.²⁵⁷

The Supreme Court omitted from its opinions the fact that the prosecutor limited his questioning concerning fluency in Spanish, and consequently, ability to ignore the Spanish speaker for the English translation, *to the four jurors with Latino surnames*.²⁵⁸ The reason the Court ignored this fact is unclear. Whatever the reason, on a record including this discriminatory questioning, a majority of the Court rejected the claim that the prosecutor's reasons for excluding Latino venirepersons amounted to the racial motivation forbidden by *Batson*.²⁵⁹

Hernandez argued that, because Spanish language ability bears such a close relation to ethnicity, exercise of the challenge on the basis of that ability constitutes the discrimination forbidden by *Batson*.²⁶⁰ Justice Kennedy's plurality opinion, joined by Rehnquist, White and Souter, demurred on this question, reasoning that the prosecutor had not relied on language ability alone but had pointed to the demeanor and responses of the individuals ques-

254. *Id.* at 1864-65 (citation omitted).

255. *Id.* at 1865 n.1.

256. *Id.* at 1865.

257. *Id.* at 1865 n.2.

258. See *People v. Hernandez*, 552 N.E.2d 621, 622 (N.Y. 1990) (Kaye, J., dissenting) ("[T]here is no indication that any other members of the panel were also asked if they spoke Spanish.").

259. *Hernandez*, 111 S. Ct. at 1862.

260. *Id.* at 1866-67.

tioned, and that this reliance was race neutral, thus meeting the first *Batson* requirement.²⁶¹

The plurality deemed the stated reason "race neutral" because it "rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about" a suspect class.²⁶² Instead it divided potential jurors into two classes: those whose voir dire conduct persuaded the prosecutor they might have difficulty in accepting the translator's rendition of Spanish language testimony and those whose testimony did not.²⁶³ Rather surprisingly (particularly if one considers that the prosecutor only asked Latino jurors about their fluency in Spanish!) the opinion announced "[e]ach category would include both Latinos and non-Latinos."²⁶⁴ To the defendant's argument that any honest bilingual juror would hesitate in answering similar questions, the plurality responded that such disparate effects might be given weight in assessing forbidden intent, but did not bear on the question of facial neutrality.²⁶⁵

The plurality opinion then addressed the question of discriminatory intent, as it claimed *Batson* required.²⁶⁶ Because the trial took place in a community with a substantial Latino population and common knowledge suggests that a significant percentage of the Latino population speaks fluent Spanish, the prosecutor's reason raised "a plausible, though not a necessary, inference that language might be a pretext [for racial discrimination]."²⁶⁷ The trial judge's decision to believe the prosecutor's race neutral explanation is subject to review under the deferential "clearly erroneous" standard.²⁶⁸ This standard is appropriate in part because findings will "largely turn on evaluation of credibility,"²⁶⁹ and, the defendant's

261. *Id.* at 1866 ("At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").

262. *Id.* at 1867.

263. *Id.*

264. *Id.*

265. *Id.* at 1867-68.

266. *Id.* at 1868.

267. *Id.*

268. *Id.* at 1871.

269. *Id.* at 1869.

contentions to the contrary, this standard of review is "reconcilable" with the scrutiny given the older venire selection cases.²⁷⁰

Applying the clearly erroneous standard, the plurality found no error.²⁷¹ The Court described the challenged exclusions as based on a "subjective criterion having a disproportionate effect on Latinos,"²⁷² but listed several factors that the trial judge could have relied on as "evidence of the prosecutor's sincerity"²⁷³

Apart from the prosecutor's demeanor, the court could have relied on the facts that the prosecutor defended his use of peremptory challenges without being asked to do so by the judge, that he did not know which jurors were Latinos, and that the ethnicity of the victims and prosecution witnesses tended to undercut any motive to exclude Latinos from the jury.²⁷⁴

The opinion also noted the prosecutor's "verifiable and legitimate" explanation for excusing two of the Latino jurors and the fact that only three of the challenged jurors "[could] with confidence be identified as Latinos" as other factors the trial court might have relied upon.²⁷⁵

At the end of the plurality opinion, after disposing of Mr. Hernandez's claim, the Court cautions the reader not to infer anything either way about the permissibility of a peremptory challenge based upon language ability per se:

In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. It *may well be*, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. And, as we make clear, a policy of striking all who speak a given language without regard to the particular circumstances of the trial or the individual responses of the jurors, *may be found*

270. *Id.* at 1871 (referring to *Norris v. Alabama*, 294 U.S. 587 (1935), and its progeny).

271. *Id.* at 1873.

272. *Id.* at 1872.

273. *Id.*

274. *Id.*

275. *Id.*

by the trial judge to be a pretext for racial discrimination. But that is not before us.²⁷⁶

Thus, the prosecutor with no reason other than language facility can, with a clear conscience, strike jurors based on language facility²⁷⁷

Justice O'Connor, joined by Justice Scalia, concurred in the judgment.²⁷⁸ If one had read O'Connor's opinion in *McCullum*²⁷⁹ first, one might have expected her sensitivity to "unconscious racism"²⁸⁰ to prompt a dissent in *Hernandez*, or at least a shaky concurrence. On the contrary, she chastised the plurality because it "goes farther than it needs to in assessing the constitutionality of the prosecutor's asserted justification for his peremptory strikes."²⁸¹ One suspects that, although she did not say so, per se language discrimination is not problematic for O'Connor. The asserted purpose of the strikes, to eliminate jurors who may not be able to accept the official translation, "[n]o matter how closely tied or significantly correlated to race" was itself not based on race.²⁸² Because "the trial court believe[d] the prosecutor's nonracial justification, and that finding [was] not clearly erroneous, that is the end of the matter."²⁸³ Perhaps Justice O'Connor thinks that only laymen, not judges and lawyers, are susceptible to unconscious racism.

Justice Stevens, joined by Justice Marshall, for reasons "essentially" shared by Justice Blackmun,²⁸⁴ dissented.²⁸⁵ Justice Stevens argued that, once the defendant establishes a prima facie case, "[u]nless the prosecutor comes forward with an explanation for his peremptories that is sufficient to rebut that prima facie case, no

276. *Id.* at 1872-73 (emphasis added) (citations omitted).

277. Should the Court later decide that per se language discrimination does violate the Equal Protection Clause, only cases still on direct appeal would be affected; others would be insulated by the limited retroactivity of most criminal procedure decisions.

278. *Hernandez*, 111 S. Ct. at 1873-75 (O'Connor, J., concurring).

279. *Georgia v. McCollum*, 112 S. Ct. 2348, 2361 (1992) (O'Connor, J., dissenting).

280. *Id.* at 2364.

281. *Hernandez*, 111 S. Ct. at 1873 (O'Connor, J., concurring).

282. *Id.* at 1874.

283. *Id.* at 1875.

284. *See id.* at 1875 (Blackmun, J., dissenting).

285. *Id.* at 1875 (Stevens, J., dissenting).

additional evidence of racial animus" should be required.²⁸⁶ Although a facially neutral explanation is *required* to rebut discriminatory purpose,²⁸⁷ a facially neutral explanation, even when believed, will rarely be *sufficient* to rebut discriminatory purpose where that justification has a "significant disproportionate impact."²⁸⁸ This is because "disparate impact is itself evidence of discriminatory purpose."²⁸⁹ An exclusive focus on the prosecutor's subjective state of mind is erroneous, for discriminatory purpose can be established "by objective evidence that is consistent with a decisionmaker's honest belief that his motive was entirely benign."²⁹⁰ To require the defendant to provide additional, subjective evidence of racial animus merely because a facially neutral reason is given would render the Equal Protection Clause "vain and illusory."²⁹¹

Applying those principles to the facts of *Hernandez*, Stevens concluded that the prosecutor's explanation was insufficient to rebut the prima facie case, whether or not it was pretextual.²⁹² It was insufficient because of the confluence of three reasons: the inevitable disproportionate effect on Spanish-speaking venirepersons; the ease with which the prosecutor's concerns could have been accommodated without striking Latino jurors, namely jury instructions or a physical arrangement permitting the jury to hear only the official translation; and the fact that the prosecutor's concerns, if substantiated, would have supported a challenge for cause, which he did not advance.²⁹³

For quite different reasons, neither the concurrence nor the dissent commented on the list of reasons proffered by the plurality as possible bases upon which the trial judge might have rested his determination that the prosecutor was credible.²⁹⁴ Nevertheless, *I* will comment on these reasons, for two related reasons. First, this

286. *Id.* at 1875.

287. *Id.* at 1875 (citing *Batson v. Kentucky*, 476 U.S. 79, 97 (1986)).

288. *Id.* at 1875.

289. *Id.*

290. *Id.* at 1876.

291. *Id.* (quoting *Batson*, 476 U.S. at 98).

292. *Id.* at 1876-77.

293. *Id.* at 1877.

294. See *supra* note 283 and accompanying text.

list is important in its signal to trial judges and attorneys. It contains guidance for the argument and adjudication of all race-based peremptory challenge issues, not just those that relate to language. Second, an item-by-item evaluation bolsters the dissent's claim that the plurality approach will render *Batson* "vain and illusory."²⁹⁵

One must first note that of the six reasons cited by the court,²⁹⁶ only one, that the victims were also Latino, was in fact alluded to by the trial judge as a reason for his decision.²⁹⁷ Thus appellate review should be doubly generous, deferring to the ultimate conclusion and speculating as to the possible underlying reasoning. Such post hoc imaginativeness provides no incentive for the judge to report her own reasoning, and therefore no incentive to examine it. If the Court were concerned at all about unconscious racism by judges, appellate review that encouraged introspection would be vastly preferable.

Moreover, the specific reasons cited by the Court as possible support for the trial judge's decision are depressingly thin. The first possible reason is demeanor,²⁹⁸ which is necessarily unreviewable.²⁹⁹ Then there is the prosecutor's spontaneous defense of his peremptory challenges without a request from the judge,³⁰⁰ a response equally consistent with a guilty conscience, and one extremely easy for subsequent prosecutors to imitate, regardless of their true purposes. Third on the list is the prosecutor's assertion that he "did not know which jurors were Latino."³⁰¹ One must wonder how this "fact" can constitute "evidence of the prosecutor's sincerity,"³⁰² when we only know it to be fact by dint of the

295. See *supra* note 291 and accompanying text.

296. See *supra* notes 274-75 and accompanying text.

297. *Hernandez*, 111 S. Ct. at 1865 n.2. Even this reason is so garbled that the Court characterized the judge's statements as "appear[ing] to accept" the prosecutor's contention that he would have no motive to strike Latino jurors because the victims were also Latino. *Id.* Moreover, all discussion of this factor occurred after the trial judge made his ruling. *Id.* at 1865. It is hard to believe that the prosecutor's later assertions concerning his motives influenced the earlier decision.

298. See *supra* note 274 and accompanying text.

299. See *Hernandez*, 111 S. Ct. at 1872 (stating that "of course [the Court has] no opportunity to review" demeanor evidence).

300. See *supra* note 274 and accompanying text.

301. *Hernandez*, 111 S. Ct. at 1872; see also *supra* note 274 and accompanying text.

302. *Hernandez*, 111 S. Ct. at 1872.

prosecutor's assertion. The fourth reason cited by the Court is more complicated, but is also wrong. The ethnicity of the victims and witnesses is said to "undercut any motive to exclude Latinos from the jury."³⁰³ It is true that a case with a Latino defendant and a white victim would present a prosecutor with an even stronger reason to exclude Latino jurors, but the motivation may also be present in a case involving a Latino victim and a Latino defendant. Evidence concerning white racism demonstrates that it has at least two relevant facets—a greater propensity to convict in an other-race defendant case *and* a greater propensity to convict in a same-race victim case.³⁰⁴ Thus if a prosecutor were informed, he would opt for the all-white jury in *Hernandez* as well as in a Latino defendant/white victim case; if he were uninformed, one hardly can guess what his reasoning might or might not be. The message to prosecutors appears to be that discrimination in minority race victim/minority race defendant cases is nonreviewable, or at least less reviewable.

The fifth reason, that only three struck jurors could with "confidence be identified" as Latino,³⁰⁵ is bizarre considering that the prosecutor struck all even arguably Latino jurors! How can any positive inference be drawn from a lack of opportunity to discriminate further? Finally, the Court cited the fact that the prosecutor had "verifiable and legitimate" reasons for two challenges as a reason that might support the trial judge's determination.³⁰⁶ This fact adds nothing probative. Perhaps the prosecutor would have discriminated impermissibly against those jurors if he had had no such "legitimate" reasons, perhaps not.

If prosecutors exist who have read *Hernandez* and cannot create a "racially neutral" reason for discriminating on the basis of race, bar examinations are too easy. If judges exist who wish to believe proffered "racially neutral" reasons and cannot rationalize that desire, impeachment for incompetence ought to be more frequent. Whatever you do, just don't say race. Don't even think about it.

303. *Id.*, see also *supra* note 274 and accompanying text.

304. See *infra* notes 359-382 and accompanying text.

305. *Hernandez*, 111 S. Ct. at 1872; see also *supra* note 275 and accompanying text.

306. *Hernandez*, 111 S. Ct. at 1872; see also *supra* note 275 and accompanying text.

III. THE LANGUAGE AND CULTURE OF PEREMPTORY CHALLENGES

The title of this Article is intended to have two different, albeit related, meanings. First, the title is intended to summarize my view of what the practice of peremptory challenges will look like after *Hernandez*: the attorney will not say race but will say something plausible—language, culture, associations, appearance, or even demeanor—and she will say it with apparent sincerity; whereupon the judge will rule that the prohibition against racial discrimination in the exercise of the peremptory challenge is not violated. This section focuses on the second meaning of the title: the conventions of language and culture that underlie peremptory challenge law. Why would the Court expand *Batson*'s sweep while thinning its broom?

A. *The Commentary*

The commentary on peremptory challenge law does not answer or, for the most part, even pose the above question. The academic response to *Batson* itself is overwhelmingly favorable.³⁰⁷ Commentators have embraced *Batson*'s expansion through *Powers* and *Edmonson* with similar enthusiasm.³⁰⁸ Law review reaction to *McCollum* has also been largely positive,³⁰⁹ with very few pro-defendant

307. See, e.g., Neuborne, *supra* note 132, at 419; Underwood, *supra* note 11, at 726-27; Jon M. Van Dyke, *Peremptory Challenges Revisited*, 12 NAT'L BLACK L.J. 114, 123 (1991); Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920 (1992); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 532-33 (1992); Note, *Developments—Race and the Criminal Process*, 101 HARV. L. REV. 1473, 1575-76 (1988); E. Vaughn Dunnigan, Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 356-58 (1988); J.L. Harvancik, Comment, *Georgia v. McCollum: Eliminating the Race-Based Peremptory Challenge Once and for All*, 27 VAL. U. L. REV. 257, 264 (1992); Mark L. Josephs, Note, *Fourteenth Amendment—Peremptory Challenges and the Equal Protection Clause*, 82 J. CRIM. L. & CRIMINOLOGY 1000, 1012 (1992); Michael M. Raeber, Note, *Toward an Integrated Rule Prohibiting All Race-Based Peremptory Challenges: Some Considerations on Georgia v. McCollum*, 26 GA. L. REV. 503, 504-05 (1992); Cynthia Richards-Rowland, Note, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195 (1987).

308. See, e.g., Neuborne, *supra* note 132, at 432-34; Underwood, *supra* note 11, at 726-27; Bray, *supra* note 307, at 547-50; Josephs, *supra* note 307, at 1000.

309. See, e.g., Bray, *supra* note 307, at 552-53; Harvancik, *supra* note 307, at 258, 284-85; see also Dunnigan, *supra* note 307, at 355 (suggesting that the defendant's peremptory chal-

objections.³¹⁰ Only one scholarly commentator, Professor Kenneth Nunn, has objected to the *Powers-Edmonson-McCollum* trio on the ground that the three cases together have shifted focus away from the black defendant.³¹¹ His views on those three cases largely are compatible with and have contributed to my own, but he does not consider *Hernandez* or its connection to those cases.

A few commentators have argued that only Justice Marshall's proposal to eliminate the peremptory challenge would prove adequate to end discrimination in its exercise.³¹² Recently, as observers have considered *Batson*'s application in the lower courts, more have expressed dismay at the justifications for peremptory challenges that have passed judicial scrutiny. These observers have not proposed jettisoning *Batson*, but instead suggest a variety of rules to confine judicial discretion.³¹³ Oddly enough, few of these com-

lenges should be as limited as the prosecutor's peremptory challenges); Raeber, *supra* note 307, at 508 (arguing for the actual result in *McCollum* before the case had been decided).

310. See Stuart Taylor, *A Step Toward a Jury of One's Fears*, LEGAL TIMES, June 29, 1992, at 21; cf. Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 811 (1989) (arguing that the defendant's actions do not amount to state action); Josephs, *supra* note 307, at 1024-25 (arguing that the Court should not extend *Batson* to defendants).

311. Kenneth Nunn, *Rights Held Hostage: Race, Ideology, and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. (forthcoming 1993).

312. See, Bray, *supra* note 307, at 564; Jonathan B. Mintz, Note, *Batson v. Kentucky: A Half-Step in the Right Direction*, 72 CORNELL L. REV. 1026, 1039 (1987).

313. See, e.g., Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293, 348-49 (1989) (advocating "substantial restrictions on both *voir dire* and peremptory challenges"); David D. Hopper, Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 836-38 (1988) (discussing the merits of limiting the number of peremptory challenges for both prosecution and defense, punishing the prosecutor for improper exercise of challenges, and mathematical or psychological testing to evaluate defendants claim); Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 YALE L.J. 187, 197-206 (1989) (proposing that defense counsel be afforded an opportunity to rebut the prosecutor's reasons for a peremptory challenge, and that hearings in which prosecutors testify under oath as to the reasons for the peremptory challenge should be permitted in the discretion of the trial judge); Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. REV. 1533 (1991) (making several recommendations, most derived from other states' laws, to aid North Carolina courts in the implementation of the *Batson* doctrine); Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 361-66 (1993) (arguing that courts should not accept "soft" reasons, e.g., intuition, for peremptory strikes, that all such strikes should be based on ju-

mentators have pounced on *Hernandez*. Even bare descriptions of *Hernandez* are relatively rare,³¹⁴ and the student notes and articles that actually comment on it are a very odd lot.

Only one article, written by Professor Juan Perea, focuses on *Hernandez*.³¹⁵ After examining the close connection between language, Latino ethnicity, and race, he concludes that exclusion of bilingual jurors is not race neutral and that *Hernandez* was therefore wrongly decided. Professor Perea also considers alternative approaches to bilingual jurors and the broader social harms created by *Hernandez*. Because his animating concern is the bilingual juror, he does not address the implications of *Hernandez* for other peremptory challenge cases.

Professor Martha Minow considers *Hernandez* briefly in the course of a discussion regarding the conceptions of bias implicit in Justice Thomas' confirmation hearings,³¹⁶ and she criticizes the *Hernandez* Court for assuming that Spanish proficiency is abnormal and problematic rather than enriching.³¹⁷ One student note pursues this avenue of criticism at somewhat greater length; the author argues that a juror's perceived inability to accept the official translation is not disqualifying but desirable.³¹⁸ Modern language theory "recognizes that [listeners] shape facts according to their own preconceived categories."³¹⁹ In this sense, bilingual jurors are no less objective than the Spanish-ignorant juror who "interprets" the official interpretation.³²⁰ Moreover, bilingual jurors may have special value as a check on the quality of the official

rors' written or oral statements, and that attorneys should be required to strike all jurors with the same "unacceptable" characteristics, regardless of race).

314. Cf. Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TULANE L. REV. 1267, 1327-28 (1992) (providing a two page description of *Hernandez* without comment); Alan B. Rich, *Peremptory Juror Strikes in Texas After Batson and Edmonson*, 23 ST. MARY'S L.J. 1055, 1067-68 (including a one paragraph description of *Hernandez*).

315. Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992).

316. Martha Minow, *Stripped Down Like a Runner or Enriched By Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1210-12 (1992).

317. *Id.*

318. Sarah B. Clasby, Note, *Understanding Testimony: Official Translation and Bilingual Jurors in Hernandez v. New York*, 23 U. MIAMI INTER-AM. L. REV. 515, 528-34 (1991-1992).

319. *Id.* at 529.

320. *Id.*

translation.³²¹ Another student note argues that *Hernandez* confirms the wisdom of Justice Marshall's concurrence in *Batson* in which he argued that peremptory challenges must be eliminated entirely.³²² The third note, written in the course of a project evaluating lower federal court decisions interpreting *Batson*, comments that *Hernandez* renders *Batson* "little more than an empty gesture toward equal protection."³²³

The only other article that comments on *Hernandez* is Barbara Underwood's *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*³²⁴ and, alas, she praises *Hernandez*. Underwood finds *Hernandez* "important because it demonstrates the capacity of the Court, and of developing doctrine, to keep the ban on jury discrimination within manageable limits."³²⁵ She notes that *Hernandez*'s differentiation between impact and intent and its deference to judicial factfinding both are consistent with her view that *Batson* "protects not the parties' interest in the composition of the jury, or in verdicts, but rather the interest of the prospective jurors in nondiscriminatory access to participation."³²⁶ Thus, Underwood is the only commentator who links the expansion of *Batson* through third party standing and state action analysis with the curtailment wrought by extremely limited, formalistic inquiries. For her, focus on the juror seems to answer the question of why the Court would broaden *Batson*'s sweep and thin its broom. Before I turn to whether focus on the juror, or any other focus, can justify that thinning, I will address the predicate question: What does the Court think it is trying to sweep?

B. *Implicit Conceptions of "Racial Discrimination" in the Current Case Law*

Batson prohibits "racial discrimination" in the exercise of the peremptory challenge just as *Strauder* prohibited "racial discrimination" in the selection of the venire. *Strauder*, however, led to

321. *Id.* at 532-33.

322. James S. Wrona, Note, *Hernandez v. New York: Allowing Bias to Continue in the Jury Selection Process*, 19 OHIO N.U. L. REV. 151, 161-62 (1992).

323. Swift, *supra* note 313, at 356.

324. Underwood, *supra* note 11.

325. *Id.* at 767.

326. *Id.* at 768.

rules that come close to assuring representative venires, whereas *Batson* has thus far led to little more than a prohibition against saying race when explaining nonrepresentative outcomes. In one sense, this contrast is part of the larger question of the meaning of the Equal Protection Clause: Do we have a color-blind Constitution?³²⁷ But, I think a narrower question is more fruitful here, if less elegant. Thus I will not survey "the taming of *Brown*"³²⁸ but will focus instead on the taming of *Strauder*.

The Court never defines what it means by "racial discrimination" in the exercise of peremptory challenges. As noted earlier, the vagueness and ambiguity of *Batson*'s descriptions of the harm it is attempting to redress suggest some early ambivalence and uncertainty.³²⁹ One could consult two quite different authorities: prior jury selection law and modern equal protection law. *Strauder*, and most of its progeny, focused on the "prejudices [that] often exist against particular classes in the community, which sway the judgement of jurors."³³⁰ In contrast, the bulk of post-*Brown* equal protection law aims at the distinction between intent and impact, requiring proof that actions were taken "because of, rather than in spite of" race.

Ironically, in this context, these two modes of analysis can be reconciled—but only from one direction. In Part IV, I shall start with *Strauder* and trace the implications of defining discrimination in this context, implications that *can* coexist with the intent-impact distinction. The protesting opinions of Justices Thomas and O'Connor in *McCullum*³³¹ and the dissents of Justices Stevens and Blackmun in *Hernandez*³³² testify to the pull of *Strauder*. Nevertheless, the intent-impact paradigm has overshadowed *Strauder*, determining all of the post-*Batson* cases and variously

327. See, most recently and notably, ANDREW KULL, *THE COLORBLIND CONSTITUTION* (1992). For a discussion placing the *Powers-Edmonson-McCollum* trilogy in the context of that larger discussion, see Nunn, *supra* note 311.

328. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

329. See *supra* notes 79-86 and accompanying text.

330. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

331. See *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992) (Thomas, J., concurring); *id.* at 2361 (O'Connor, J., dissenting).

332. See *Hernandez v. New York*, 111 S. Ct. 1859, 1875 (1991) (Blackmun, J., dissenting); *id.* (Stevens, J., dissenting).

distracting three of the protestors³³³ away from the "prejudices . . . which sway jurors."³³⁴

If actions taken "because of, not in spite of" race define racial discrimination, then the step to the conclusion that color-consciousness must be either avoided or overridden is small and easy. The majority opinions in several of these cases attempt to avoid such color-consciousness, as well as prohibit it. *Powers* avows the Court's color-unconsciousness³³⁵ in the process of declaring that the race of the defendant makes no difference in determining whether a prosecutor may exclude black jurors from the defendant's jury.³³⁶ Just as the prosecutor should not take action because of the juror's race, the Court should not fail to take action because of the defendant's race. In order to ignore the defendant's race in *Powers*, the Court had to assert that *Batson* protected venirepersons' rights as well as defendants' rights.³³⁷ In *Edmonson*, the Court followed the *Powers* rationale to new heights of color-unconsciousness by ignoring the race of the black litigant and determining only the third party claim of the black excluded jurors.³³⁸ In *McCollum*, the majority answered Justices Thomas' and O'Connor's expressed concerns about the implications of the case for black defendants obliquely through its reference to voir dire,³³⁹ refusing to even acknowledge the racially specific argument.

Thus the rubric "[j]ust don't say race" sometimes seems to apply to the Court itself. I think this odd application of the norm of color-unconsciousness both flows from and reinforces some unexamined corollaries of that norm. Not surprisingly, those same, now reinforced, corollaries then determine the outcomes in the cases. The four corollaries I have in mind, whatever their truth in other contexts, all turn out to be false when tested in the setting of a criminal trial.

333. See *id.* at 1873 (O'Connor, J., dissenting); *McCollum*, 112 S. Ct. at 2351 (Blackmun, J.) (Justice Stevens joined the majority.).

334. *Strauder*, 100 U.S. at 309.

335. I use the term "color-unconsciousness" both because I wish to sidestep the broader debate about "color-blindness" and because I like its sting.

336. *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991).

337. *Id.* at 1369.

338. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2080 (1991).

339. *McCollum*, 112 S. Ct. at 2357.

The first, and most basic, corollary of a color-consciousness definition of racial discrimination is that acknowledging or assuming difference is wrong. First the "prejudice" of *Strauder*, the white racism it presumes, becomes the more generic "bias" prohibited by *Batson*. Next, because the assumption that black defendants are different than white defendants is forbidden, we cannot assume that white defendants are harmed less than black defendants by the striking of black jurors. Therefore, the decision in *Batson* determines *Powers*. Then we deduce that we cannot assume that a black defendant is hurt by the removal of black jurors, for that would imply a forbidden assumption that black jurors will decide cases differently than will white jurors; hence the *Edmonson* approach, which throws away the equal protection right of the black litigant in favor of the third party standing rights that had to be recognized in *Powers*. But if any assumption of different decision-making is invalid then the defendant really is not harmed by her inability to strike jurors of another race. *McCollum* concludes that she only thinks she is harmed, and we need not give deference to such racist fears. Moreover, there is no reason to treat separately the question of black defendants who desire to strike white jurors and white defendants who wish to strike black jurors; there is no (cognizable) difference.

Rather than prohibiting racism, this chain of reasoning prohibits perceptions of difference, including perceptions of different levels of racism. Although *Hernandez* is not determined by this "see no difference" corollary, it fits comfortably with it.³⁴⁰ *Hernandez* is compelled, however, by the three remaining corollaries. The second corollary—that racial "bias," or assumption of difference, is unusual—necessarily is linked to the first: if racial bias were common in criminal trials, the corollary prohibiting the acknowledgment of difference would collapse, for assumptions of difference about the judging of guilt would then be correct. On the other hand, if racial bias is unusual, then *Hernandez* starts to make sense. Why would an attorney strike jurors on the basis of their race? Either because

340. If we do not assume bias on the part of jurors based on their race, why would we assume bias on the part of attorneys or judges? If the prosecutor tells us she is not biased, why should we believe that she is? Certainly not because of the race of the jurors she struck! This proves too much, of course. If all of the above is true, why does the Court require the prosecutor to give any explanation at all?

of her own bias, but that is rare, because of jurors' biases, but those are also rare, or because she is stupid, which we can assume is rare. Therefore, few peremptory challenges will be exercised on the basis of race. If few peremptory challenges are racially motivated, then the odds are that any given challenge is not racially motivated. If there is doubt, therefore, a strike should be upheld.³⁴¹

This conclusion is buttressed by the third corollary, which holds that color-consciousness, or bias, is easy to identify. Bias will stick out because it is unusual. Perhaps the logic of the last sentence is not foolproof, but reasoning from its converse is a prod to the doubting. Suppose instead that the incidence of bias is rare and unmarked, something like a churchgoing schoolteacher ax-murderer. In that case, peremptory challenge law falls apart. Because bias is rare, it cannot be presumed in all cases. Because bias is not obvious, it usually will be undetectable. Because acknowledging difference is itself bias, we cannot increase the odds of detecting it by considering the race of the parties who might harbor bias. Thus *Batson* is either a disingenuous charade or an ill-conceived sinkhole.

Because that progression leads to either despair or cynicism, the color-consciousness definition requires that bias be assumed to be evident as well as unusual. Now, if bias probably is harbored by a few miscreants, whom we can identify, then both the *Hernandez* sign-off on facially neutral reasons and the deference it accords the trial judge become natural, even inevitable. The racially biased attorney will not be able to hide her bias behind racially neutral reasons, either because she is so odd she cannot even think of racially neutral pretexts, or because the judge will recognize the biased attorney for the miscreant she is.

This leaves only one problem, beyond the credibility of these corollaries in the criminal trial context: what if the judge is racially biased too? The *Batson* majority's answer—that we should trust trial judges to obey the law—is only satisfactory if bias is conscious. If bias were sometimes unconscious, then a judge might in

341. The conviction that bias is unusual also could explain the Court's sanguine reliance, in *McCollum*, on the restricted voir dire right as a substitute for the defense's use of peremptory challenges. *McCollum*, 112 S. Ct. at 2357. It is the unusual case that prompts the expression of bias just as it is the unusual person who harbors bias.

good faith believe she was executing the law, but in fact be approving the racially biased action of attorneys. A belief that bias is always conscious also braces the wobbling third corollary: if bias is conscious, it is more likely to be detectable, particularly by trial judges, who have some expertise in assessing credibility.

There! Maybe we blurred the line a bit between premises and rationalizations, maybe we called what was really only juryrigging³⁴² "architecture" but it's all still standing.

C. *Possible Defenses of the Color-Consciousness Conception of Racial Discrimination*

Barbara Underwood posed the question, "whose right is it?" and sought the most coherent answer *from the structure of the decided cases*.³⁴³ But what an odd edifice the decided cases form; perhaps it is better to question the edifice. If it does not provide significant shelter for *any* of the parties whose rights might be at stake, then it ought to be remodeled.

1. *Color-Consciousness from the Defendant's Perspective*

I start with the defendant because her interest in a just outcome, if implicated, certainly trumps any other interest that might be put forward. From the defendant's perspective, particularly from the African American or Latino defendant's perspective, both the recent case law and the underlying definition of racial discrimination as color-consciousness are disastrous.

In Part II, I criticized the recent case law from the defendant's perspective. To recapitulate briefly, post-*Batson* case law presents three negative developments for defendants. First, the doctrine switches from a focus on the defendant's right to a focus on the juror's right. Second, the scrutiny of prosecutorial peremptory challenges becomes limited to a requirement that the prosecutor credibly assert a race neutral reason, regardless of its persuasiveness or disparate impact. Finally, a bar now is imposed on the defendant who openly seeks to obtain a more favorable jury through the use of racially motivated peremptory challenges.

342. Pun intended. It is altogether too easy to guess whose jury was rigged in this process.

343. Underwood, *supra* note 11.

In this setting, the implications of the underlying paradigm of racial discrimination as color-consciousness are even more disheartening than the case law. In the adjudication of guilt, to equate racial discrimination with *acknowledgement* of difference is so bizarre that it would be hilarious, were it not tragic. Difference is rampant. To name just a few of the disparities: overall offender rates are radically different in different ethnic groups,³⁴⁴ as are preferred offenses,³⁴⁵ victimization rates,³⁴⁶ imprisonment rates,³⁴⁷ representation on police forces,³⁴⁸ and deaths caused by law enforcement officials.³⁴⁹ This information is not a secret; on the contrary, public perception of crime often exaggerates existing differences³⁵⁰ and the media gives disproportionate coverage to minority participation in crime.³⁵¹ To define racial discrimination as awareness or acknowledgement of difference thus *in this context* legislates a bald-faced lie; even worse, it blinds the observer to the far more pressing evil of racial prejudice, or "prejudging." In *Batson*, the Court was correct to forbid the assumption that black jurors were more likely to be "biased" in black defendant cases,³⁵² but not because the correct assumption is a race neutral one. The correct assumption is that *white* jurors are more likely to be "biased" in a black defendant case than are black jurors. Of course, from a prosecutor's perspective, whether one labels the black juror "biased" in favor of the defendant or the white juror "biased" against

344. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 181-82 (1992).

345. *Id.* at 181-82, 184.

346. *Id.* at 183.

347. *Id.* at 236.

348. *Id.*

349. *Id.* at 189.

350. *See id.* at 187-88; *see also* Daniel J. Abbott & James M. Calónico, *Black Man, White Woman—The Maintenance of a Myth: Rape and the Press in New Orleans*, in *CRIME AND DELINQUENCY: DIMENSIONS OF DEVIANCE* 141, 147-49 (Marc Riedel & Terence P. Thornberry eds., 1974); Jean-Marie B. Mayas, *Perceived Criminality: The Attribution of Criminal Race From News-Reported Crime* (1977) (unpublished Ph.D. dissertation, University of Michigan).

351. *See, e.g.,* Abbott & Calónico, *supra* note 350, at 147-49; Kirk A. Johnson, *Objective News and Other Myths: The Poisoning of Young Black Minds*, 60 J. NEGRO EDUC. 328 (1991); Ellis Cose, *Rape in the News: Mainly About Whites*, N.Y. TIMES, May 7, 1989, § 4, at 27; Ellen J. Pollack & Stephen J. Adler, *Justice for All?, Legal System Struggles to Reflect Diversity, but Progress Is Slow*, WALL ST. J., May 8, 1992, at A1, A2.

352. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

him *does not matter*; either perception leads him to want to strike the black juror in a black defendant case. But the difference is crucial, for no defendant is entitled to a jury biased for him and every defendant is entitled to a jury not biased against him. White jurors must be deemed biased against black defendants if, in identical situations, they are more likely to convict a black defendant than a white defendant.³⁵³

The evidence that white jurors are in this sense more likely to be biased in a minority race defendant case is so overwhelming that it is ludicrous to proscribe such an assumption. *Strauder* treats the validity of that assumption as beyond dispute,³⁵⁴ and as Justice Thomas said in *McCullum*, "I do not think that this basic premise has become obsolete."³⁵⁵ There are many reasons to believe

that assumption is still valid, beginning, as Justice Thomas did, with the fact that the public clearly believes that the racial composition of juries matters. Thomas cited a computer search that found that the phrase "all-white jury" appeared more than two hundred times during a five year period in the *New York Times*, the *Chicago Tribune*, and the *Los Angeles Times*.³⁵⁶ One could as easily cite the Los Angeles riots. Moreover, public perceptions focus on white bias. In contrast to their views about racial discrimination in the workplace, most white Americans believe that black persons suffer discrimination in the criminal justice system.³⁵⁷

It would be surprising if white Americans thought something derogatory about themselves that was not true. It would also be surprising if prosecutors, the on-the-scene experts, *wrongly* thought that race of jurors mattered in assessing the guilt of black defendants, and it is absolutely clear that they did think it mattered. Prior to *Batson*, prosecutors used peremptory challenges to rid the jury of black jurors in black defendant cases with overwhelming

353. Bias cannot be judged in the abstract. It makes the most sense to consider the "typical" adjudication of guilt as the standard for what a fair jury trial means.

354. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

355. *Georgia v. McCollum*, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring in the judgment).

356. *Id.* at 2360 n.1.

357. *Black and White*, *supra* note 9, at 23.

frequency³⁵⁸ It would also be surprising if defense attorneys were so vigorously—and, in the *Swain* era, despite so little hope—resisting a practice that actually did not disadvantage their clients.

There is far more evidence than merely the opinions of the public and the bar. A cross-disciplinary survey of evidence about white juries and their evaluation of the guilt of black defendants provides a large body of data supporting the inference that, for many white jurors, race is a factor in the determination of guilt.³⁵⁹ Trial data, while not conclusive, point strongly toward the conclusion that race influences criminal trial outcomes. Several studies of conviction rate data find that black defendants are significantly more likely to be found guilty than are white defendants charged with the same crime.³⁶⁰ Other conviction rate studies show a decrease in conviction rates following changes in jury selection procedures that resulted in the inclusion of more black and Latino jurors.³⁶¹ Death penalty studies, including the famous Baldus study reviewed in *McCleskey*,³⁶² consistently show that juries that are primarily or all-white disproportionately impose the death penalty on black offenders with white victims, with the race-of-victim effect being an

358. JON M. VAN DYKE, JURY SELECTION PROCEDURES 154-56 (1977); George W. Crockett, Jr., *Racism in the Courts*, 20 J. PUB. L. 385, 387 (1971); George Hayden et al., *Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Information Use in the Massachusetts Jury Selection Process*, 13 NEW ENG. L. REV. 768, 790 (1978); Lisa Van Amburg, Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U. L.J. 662, 667 (1974); Steve McGonigle & Ed Timms, *Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, Mar. 9, 1986, at A1 (finding that in 100 trials in Dallas County in 1983-1984, prosecutors struck 405 of 467 eligible black jurors; five times as many qualified black jurors were struck than white jurors); see also *United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975) (noting 15 criminal cases involving black defendants in which prosecutors struck 81% of black jurors); *United States v. McDaniels*, 379 F. Supp. 1243, 1244-45 (E.D. La. 1976) (noting 53 criminal cases involving black defendants in which prosecutors used 68.9% of their peremptory challenges against black jurors, although the venire was less than one quarter black); *McKinney v. Walker*, 394 F. Supp. 1015, 1017-18 (D.S.C. 1974) (noting 13 criminal trials involving black defendants in which prosecutors peremptorily challenged 82% of black jurors); *People v. Payne*, 457 N.E.2d 1202, 1210-11 (Ill. 1983) (Simon, J., dissenting) (citing numerous Illinois cases in which prosecutors exercised the peremptory challenge in a racially discriminatory manner).

359. See Johnson, *supra* note 50, at 1615-50.

360. *Id.* at 1620-21.

361. *Id.* at 1621-22.

362. *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987).

extremely important factor.³⁶³ Considering that sentencing studies suggest anti-minority bias on the part of at least some white judges;³⁶⁴ one would expect that a greater proportion of jurors would be influenced by race. Finally, a comprehensive three year investigation of the New York courts, commissioned by the Chief Judge of the New York Court of Appeals, found racism to be very prevalent.³⁶⁵

Mock jury studies provide even stronger evidence that racial bias often affects the determination of guilt. I have reviewed these studies in some detail elsewhere,³⁶⁶ but I briefly will summarize their results here. Nine fairly recent experiments find that the race of the defendant directly and significantly affects the determination of guilt: white subjects in all of these studies were more likely to find a minority race defendant guilty than they were to find an otherwise identical white defendant guilty.³⁶⁷ Studies that fail to find a direct cause and effect relationship between race of the defendant and guilt attribution frequently have not differentiated between the responses of white and black subjects. Mixing the responses probably conceals offsetting tendencies to judge

363. See, e.g., William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 578 (1980); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 38-45 (1984); Linda Foley, *The Effect of Race on the Imposition of the Death Penalty* (1979)(paper presented at the meeting of the American Psychological Association in New York, Sept. 1979).

The fact that the Court did not find this kind of evidence sufficient proof that McCleskey himself would not have been sentenced to death had his victim been black does not diminish the importance of these findings for jury selection theory. It is not necessary to pinpoint which defendants have been treated unfairly, but only to note that some are.

364. See Johnson, *supra* note 50, at 1623-24; Joan Petersilia, *Racial Disparities in the Criminal Justice System: A Summary*, 31 CRIME & DELINQ. 15, 21-22 (1985) (finding that judges impose heavier sentences on Latinos and African Americans holding felony severity and criminal record constant); James D. Unnever & Larry A. Hembroff, *The Prediction of Racial/Ethnic Sentencing Disparities: An Expectation States Approach*, 25 J. RES. CRIME & DELINQ. 53 (1988); Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 127 (1988); cf. Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW & SOC'Y REV. 1197 (1990) (finding that both black and white judges treat black defendants more harshly, but hypothesizing the possibility of different reasoning).

365. Jerry Gray, *Panel Says Courts Are "Infested with Racism,"* N.Y. TIMES, June 5, 1991, at B1.

366. Johnson, *supra* note 50, at 1626-34.

367. *Id.* at 1626.

defendants of another race as more likely to be guilty, because most studies investigating minority race subjects have found a pattern of disfavoring white race defendants.³⁶⁸ The several studies that find white subjects more likely to vote for conviction if the victim is white are also instructive.³⁶⁹ These studies indirectly support the findings that the race of the defendant affects guilt attribution, and they pose the possibility of a cumulative effect of race of the defendant and race of the victim such that the black defendant accused of victimizing a white person is doubly disadvantaged by a white jury.³⁷⁰ Moreover, research on race, "attractiveness," and blameworthiness reinforces and helps explain the mechanism through which anti-black bias operates.³⁷¹ White subjects tend to perceive black faces as less beautiful than white faces, tend to perceive black defendants as coming from a lower socioeconomic class than otherwise identical white defendants, and tend to assume greater attitude dissimilarity from black persons.³⁷² White subjects are also more likely to judge physically unattractive defendants guilty, more likely to judge lower class defendants guilty, and more likely to judge defendants with dissimilar attitudes guilty.³⁷³

Finally, general research on the nature of prejudice and its persistence support the conclusion that jury determinations of guilt are particularly likely to evoke white prejudice. A 1990 survey by the National Research Opinion Center found that more than half of all-white respondents *said* they thought black people were more prone to violence than white people.³⁷⁴ Another study showed that whites' opinions on how honest they perceived black people to be changed markedly for the worse when the subjects were led to believe that the researcher had a physiological measure of their true

368. Moreover, two of three studies I reviewed found an interaction between race, guilt attribution, and a third variable. The third variable may have involved an uninvestigated offsetting race of the victim effect. *Id.* at 1631-32.

369. *Id.* at 1634-35.

370. *Id.* at 1634.

371. *Id.* at 1638.

372. *Id.* at 1640.

373. *Id.* at 1639.

374. T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 332 (1992). One might guess that an even greater percentage of whites thought so.

attitude.³⁷⁵ Of course, jury voir dire contains no such appearance of a reliability check. White subjects supplied with negative information about a person respond more unfavorably when the person is described as black.³⁷⁶ One might therefore expect greater credence would be given by white jurors to prosecution evidence in cases involving black defendants than in cases involving white defendants. Conversely, if a person is described as black, white subjects are less interested in evaluating the other traits that person possesses,³⁷⁷ are less likely to be influenced by other characteristics in determining that person's likability,³⁷⁸ and are less responsive to positive nonverbal communication from black persons.³⁷⁹ One would therefore expect that white jurors might overlook cues that a black defendant's testimony was credible. Negative stereotypes appear to be triggered with vastly greater frequency when black people are pictured in stereotypical settings.³⁸⁰ Jurors might thus be expected to respond with negative stereotypes of criminality when observing a black defendant accused of a crime. Moreover, it has long been understood that socially disapproved prejudice is most likely to be acted upon when it can be practiced covertly. The complexity of the facts at issue in a jury trial may permit racially motivated arguments that never allude to race.³⁸¹ Finally, as many white Americans are quite insensitive to cues of prejudiced behavior in others,³⁸² racist behavior by prejudiced jurors may be inaccessible even to unprejudiced white jurors.

Thus the evidence of a greater risk that white jurors will be prejudiced in cases involving black defendants is extraordinarily strong. When such jurors sit on a black defendant's jury, the harm

375. Harold Sigall & Richard Page, *Current Stereotypes: A Little Fading, a Little Faking*, 18 J. PERSONALITY & SOC. PSYCHOL. 247, 252 (1971).

376. Patricia W. Linville & Edward E. Jones, *Polarized Appraisals of Out-Group Members*, 38 J. PERSONALITY & SOC. PSYCHOL. 689, 689 (1980).

377. HOWARD J. EHRLICH, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* 81-82 (1973); Linville & Jones, *supra* note 376, at 689.

378. EHRLICH, *supra* note 377, at 81-82.

379. Joseph P. Forgas & L.B. Brown, *The Effects of Race on Observer Judgements of Nonverbal Communications*, 104 J. SOC. PSYCHOL. 243, 246-49 (1978).

380. Paul F. Secord et al., *The Negro Stereotype and Perceptual Accentuation*, 53 J. ABNORMAL & SOC. PSYCHOL. 78, 81 (1956).

381. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 56-57 (1954).

382. Steven A. Rollman, *The Sensitivity of Black and White Americans to Nonverbal Cues of Prejudice*, 105 J. SOC. PSYCHOL. 73 (1978).

to the defendant is both obvious and potentially extreme, for those jurors may vote for conviction whereas an unbiased juror would have voted for acquittal. The color-consciousness model of racial discrimination in jury selection fails to recognize the harm of racially biased decisionmaking or, in any significant measure, to prevent this harm. The corollary assumptions about racial prejudice—that it is rare, obvious and conscious—largely rob the defendant of even the protection that an unadorned color-consciousness model could have provided. These assumptions, which underlie both the minimal scrutiny of the prosecutor's reasons in *Hernandez* and the assertion in *McCullum* that the defendant does not need peremptory challenges to screen out racially biased jurors, are blatantly false.³⁸³

The social science literature documenting the persistence of negative attitudes toward African Americans is literally overwhelming.³⁸⁴ Although less evidence exists concerning other racial minority groups, it is clear they too face substantial prejudice.³⁸⁵ While “dominative racists,” persons who express bigotry and hatred openly, are less common than they were twenty-five years ago, they have been replaced, in substantial measure, by closet or “aversive” racists, persons who continue to hold negative stereotypes of minorities and wish to avoid them.³⁸⁶ The modern racist recognizes the formal antidiscrimination norm, and denies racial prejudice, but given the opportunity, will express racism indirectly and covertly, sometimes without conscious awareness of the racial

383. See *supra* notes 339-42 and accompanying text.

384. For easily accessible materials that summarize the primary literature, see HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1985); Aleinikoff, *supra* note 374; Johnson, *supra* note 50; Howard Schuman, *Changing Racial Norms in America*, 30 MICH. Q. REV. 460 (1991). See generally HACKER, *supra* note 344 (citing numerous figures and statistics showing the gross social and economic disparities between black and white society in modern America).

385. See, e.g., HUBERT M. BLALOCK, JR., *RACE AND ETHNIC RELATIONS* 21 (1982); Jack Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAV. SCI. 275 (1983); Tom W. Smith & Glenn R. Dempsey, *The Polls: Ethnic Social Distance and Prejudice*, 47 PUB. OPINION Q. 584, 593-94 (1983); J. Solernou, *Effects of Ethnic Group Membership and Attribution of Responsibility* 58, 72 (1977) (unpublished dissertation, University of Kentucky).

386. Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027-28 (1988).

prejudice.³⁸⁷ Modern racists do not carry signs, nor are they likely to engage in uncomfortable introspection.

Peremptory challenge law could be worse for the defendant of color. *Swain* was worse—but probably not much worse.

2. *Color-Consciousness from the Juror's Perspective*

Because litigants have so much more at stake than do jurors, placing the excluded juror at the center of jury selection law seems like an odd “misordering of priorities.”³⁸⁸ Professor Underwood explains this apparent inversion by claiming that a litigant’s stake *in jury selection* is “highly speculative,” both because the ban on jury discrimination may not affect the composition of the jury and because the racial composition of the jury may not affect the verdict.³⁸⁹ As I have argued above, the defendant’s stake in the racial composition of the venire is far less speculative than Professor Underwood asserts. Moreover, the fact that the composition of the venire may not always be affected by jury selection is irrelevant in assessing how much weight to give the defendant’s interest when the composition actually is affected. But even if Professor Underwood’s rationale for discounting the defendant’s interest and focusing on the juror were meritorious, the present structure of jury discrimination law would be empty, for it is inhospitable to jurors as well as defendants.

As Professor Underwood acknowledges, many prospective jurors find jury service onerous. She claims that such jurors are “nevertheless deeply injured by an exclusion based upon race,” reasoning that (1) no one likes to be rejected, even for an onerous task; (2) when the basis for rejection is race, the injury is compounded; and (3) when the task is widely understood as a fundamental aspect of citizenship, as jury service is, then rejection translates into “a judgment of unfitness for citizenship.”³⁹⁰ I doubt that *all* jurors feel such injury when excluded on the basis of race. For some jurors,

387. *Id.*, see also TEUN A. VAN DIJK, COMMUNICATING RACISM: ETHNIC PREJUDICE IN THOUGHT AND TALK (1987) (presenting a cross-cultural study of narratives involving issues of race).

388. *Georgia v. McCollum*, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring).

389. Underwood, *supra* note 11, at 745.

390. *Id.* at 745-46.

the costs of being a juror are extraordinarily high. A flat assertion that the psychological pain of being excluded on the basis of race always outweighs the benefits seems to me either extremely dogmatic or paternalistic. Moreover, "exclusion on the basis of race" is too broad a category for assessing whether there is psychological harm.³⁹¹ Imagine a situation in which a white person who as part of a largely white venire is challenged by defense counsel for a black defendant. Even if this person realizes that she is challenged in the hopes of reaching a black juror, it is hard to believe this person would translate the exclusion into a "judgment of unfitness for citizenship."³⁹²

And, even if we were to assume that many excluded jurors would experience this "deep injury" upon exclusion, post-*Batson* peremptory challenge law does not do much to prevent such injury. From the juror's perspective, a *Swain* era challenge looks exactly the same as an *Hernandez* era challenge.³⁹³ Is it really plausible to think that the Latino jurors in *Hernandez* did not perceive racial discrimination? Because *Batson* hearings are usually done outside the jury's presence, even the facially neutral reason that placated the Court is not available to the juror. Underwood might argue that a juror-focused *Batson* leads to fewer such injuries, because in the *Swain* era the "truly" racially discriminatory challenge was permitted. The color-consciousness model that explains the post-

391. I consider briefly a comparison from my own experience with the varied reactions to discrimination based on an immutable trait. In the 12 years I have taught at Cornell Law School, the job of "faculty secretary" has always fallen to a male faculty member, generally a quite junior male faculty member, despite the fact that there have been four entry level women hired during this period. I am not insulted; I have understood that exclusion to represent sensitivity to the implications of calling a young female professor a "secretary." Another of my female colleagues said she had been unaware of the exclusion. When informed of the various persons who had served in the position, she too inferred discrimination, but inferred a different, less generous motive for the exclusion and expressed relief that she had not been asked to serve in the annoying job. A third female colleague said she had observed the discrimination, seen benign motives, and was not upset. She also mentioned other professional committees that seemed to have practiced the same discrimination regarding the position of secretary. A variety of emotional responses to "discrimination" are possible: one might be unaware of discrimination, and thereby feel no pain; one might be aware but pleased by the discrimination by virtue of the motive ascribed to the discriminator; or one might be aware, pained by the perceived motive, but nevertheless pleased at the outcome. Generalization is risky.

392. Underwood, *supra* note 11, at 746.

393. See *supra* notes 39-57, 260-77 and accompanying text.

Batson cases implies, however, that there would have been very little such discrimination even during the *Swain* era;³⁹⁴ therefore, *Batson* would make very little difference in the number of cases in which jurors are struck on the basis of race. Moreover, in the small category of cases in which *Batson* would invalidate an impermissible challenge, the harm to the individual juror would remain the same as it would have been under *Swain*. *Batson* does not mandate reseating the struck jurors. Typically, the trial court, upon finding a *Batson* violation, will simply begin jury selection anew or, if the matter reaches an appellate court, that court will require a new trial.³⁹⁵ The struck juror is in the same position as under *Swain*: walking home with her "deep injury." It is only then, in the smallest subcategory of cases—those in which the attorney is deterred from racially motivated exercises of the peremptory challenge—that the juror is benefitted, if at all. If *that* is not "speculative harm," I wonder what is. If that is worth the elaborate *Batson* procedure and the thousands of *Batson* appeals, surely the defendant's "speculative interest" is worth a more searching inquiry.

3. *Color-Consciousness from the Public's Perspective*

The third interest cited by the Court as underlying *Batson* is the public's interest.³⁹⁶ In arguing for recognition of a juror's right to nondiscrimination, Professor Underwood includes the contention that the strong public interest in ending race-based jury selection "helps to explain why it is so important to protect those rights."³⁹⁷ It is unclear why this interest would bolster a juror-based right more than a defendant-based right. But whether the public interest is support for a defendant's claim or a juror's claim, it can no better justify the color-consciousness model of jury selection discrimination than can either of the primary interests.

In none of these cases does the Supreme Court discuss the public's interest at great length, and for good reason. In *McCullum*, the Court refers to perceptions of injustice, citing public unrest

394. This is probably a counterfactual assumption, but one necessary to the color-consciousness model. See *supra* notes 340-41 and accompanying text.

395. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

396. *Id.* at 87.

397. Underwood, *supra* note 11, at 749.

that occurred upon the exercise of racially motivated peremptory challenges that produced an all-white jury³⁹⁸ This line of reasoning collides with *Hernandez*. One hardly suspects that technical changes in voir dire and jury selection would have mollified the public. Peremptory challenge law did nothing to mollify the outrage in Los Angeles produced by the acquittal of the police officers accused of beating Rodney King. Such anger is about results, and the composition of the jury that produced those results. If the Court had cited the Los Angeles events instead, would it have prohibited a jury composed of no African Americans?

Professor Underwood's argument concerning community interest is longer, but not better. She first notes that race-based jury selection may harm the public in several ways.³⁹⁹ Then she patronizingly describes the harm:

First, it may operate through racial stereotypes held by members of the public. People may believe that an all-white jury will be biased against a black defendant, or biased in favor of a white defendant accused of a crime against a black victim. While these racial stereotypes about jurors cannot properly serve as the foundation of any legal rule or right, they can nevertheless undermine public confidence in the fairness of verdicts and thus increase the harm resulting from race-based jury selection.⁴⁰⁰

Thus, according to Professor Underwood, the public is wrong to feel the way it does, and that allows us to disregard their feelings when formulating doctrine, but only when we choose to do so. That public outrage clearly follows both the defendant's and the victim's interests in the outcome, rather than the jurors' interests in not being excluded, need not deter us.

Perhaps sensing the awkwardness of this assertion—though not willing to abandon it—Underwood moves on to the second public interest: “the proper interest of the public at large,” which she claims does not depend upon “reliance on any such stereotypes.”⁴⁰¹ This is the interest in accurate verdicts, an interest that is harmed

398. *Georgia v. McCollum*, 112 S. Ct. 2348, 2354 (1992).

399. Underwood, *supra* note 11, at 748.

400. *Id.* at 748-49.

401. *Id.* at 749.

by the exclusion of a distinct racial group from the jury “not by virtue of any particular theory about the likely sympathies of the excluded jurors, but rather because the factfinding process is impoverished.”⁴⁰² But what would allow us to believe that the factfinding process is impoverished? *Only a belief that members of different racial groups have—not always, but typically—different experience and knowledge.*⁴⁰³ Such an assumption is no more race-neutral or color-blind than the assumption that black jurors—not always, but typically—will treat the black defendant more fairly than will white jurors. Both assumptions rely on the “stereotypes” Underwood claims are impermissible.⁴⁰⁴ Moreover, the assumptions are related. To the extent black jurors as a group have had different experiences of racism than white jurors as a group, they are more likely to differ in their readiness to convict an accused black defendant. The first example that comes to mind concerns experiences of police brutality and racial hostility: jurors with these experiences are likely to view police testimony in resisting arrest cases with greater skepticism. A second obvious example concerns the fact that white persons make substantially more errors in identifying people of color than in identifying white peo-

402. *Id.*

403. Indeed, when she introduced the notion of “impoverished factfinding” earlier in her article, Professor Underwood cited with approval the following language from the plurality opinion in *Peters v. Kiff*, 407 U.S. 493 (1972):

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Underwood, *supra* note 11, at 747 (citing *Peters*, 407 U.S. at 503-04).

404. Of course, one may argue that the two stereotypes are different in other ways, that one is either less likely to be true or more demeaning. Professor Underwood, however, does not argue that, and the color-consciousness model of discrimination does not seem to permit such argument. Moreover, the evidence that race affects guilt attribution is far more concrete than the evidence supporting a general claim that racial diversity improves factfinding through the different experience it brings to the jury box. The second assertion is so general as to be completely untestable. Finally, while the *Swain* presumption that black jurors are less likely to be fair in black defendant cases is a demeaning one, the assumption of *Strauder* is not. See *infra* part IV

ple.⁴⁰⁵ Black jurors who have had the experience of being mistaken for another not-so-similar black person⁴⁰⁶ will view white cross-racial identification testimony with a more jaundiced eye.

Professor Underwood also claims that the community is harmed by biased juror selection because "courts that permit race-based jury selection present themselves to the public as hypocrites" and because "[t]here is simply no room for race-based exclusions from the central institutions of representative government: the electorate and the jury."⁴⁰⁷ But precisely the same things could be said regardless of how we choose to define racial discrimination in jury selection. These statements are truisms, and certainly could accommodate a much richer understanding of racial discrimination. Indeed, if the courts are worried about charges of perceived hypocrisy and exclusion, *Hernandez* is to no avail; it merely adds the charge of disingenuousness.

Moreover, the color-consciousness model completely ignores the public interest in racially unbiased *results* just as it ignores the defendant's interest in racially unbiased results. While the evidence supporting the existence of these two interests largely coincides and has already been summarized,⁴⁰⁸ the interests themselves are not coextensive. The public interest is broader, for it encompasses cases in which the jury selection process threatens the risk of racial bias not against the defendant, but against the victim. *McCollum* presented an opportunity to look at that interest, but the color-consciousness model precluded its acknowledgment. Thus, the color-consciousness model of jury selection discrimination neither accords with public perceptions of justice nor adequately protects the public interest in justice itself.

Thus it is hard to imagine that any of the interested parties—the defendant, the juror, or the public—are well served by the color-consciousness model of racial discrimination in jury selection. Remodeling jury selection to fit the color-blindness norm has led to a bizarre structure; standing but not sturdy, resource-greedy,

405. See Sheri L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984).

406. This experience is one which my African American students report is virtually universal for African Americans.

407. Underwood, *supra* note 11, at 749-50.

408. See *supra* notes 344-87, 396-407 and accompanying text.

and virtually uninhabitable. The color-blindness norm has been most fully developed in the affirmative action cases, but jury selection cases are in no sense affirmative action cases. Jury selection is not about the value of African American role models and whether or not the benefits to school children outweigh the harm to white teachers.⁴⁰⁹ It is not about prior discrimination in an industry, or a society, and how that discrimination may be remedied without aggravating prejudice or inappropriately fixing the costs of that discrimination on a relatively small number of persons.⁴¹⁰ Nor is it about an enriching diversity of experiences and information⁴¹¹ in the public airwaves or the courtroom.⁴¹² Whatever the merits of, or limits to, the color-blindness norm in the affirmative action context, it should not determine the definition of racial discrimination in the context of the criminal trial.

IV TO SAY RACE

A rose by any other name would smell as sweet, and racial discrimination called Spanish language proficiency is still as odious. It is not the saying of race, but what we do with it, that causes injury. The trick is not to ban the word "race," or even to ban awareness of race, but to eliminate race-based harm.

A. *An Alternative Conception of Racial Discrimination in Jury Selection*

If we begin the attempt to define "racial discrimination" in the jury selection context with *Strauder*, rather than with the intent-impact distinction of modern equal protection law, a quite different conception of racial discrimination emerges. That conception can still be reconciled with the intent-impact distinction, but it diverges radically from the color-consciousness model and its corollaries of rare, obvious, and conscious discrimination.

409. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that the school board's preferential extension of protection against layoffs to minority school teachers violates the Fourteenth Amendment).

410. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

411. Professor Underwood, however, might think so.

412. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

The Court in *Strauder* found that a statute excluding black people from jury service violated the equal protection rights of black defendants because “[i]t is well-known that prejudices often exist against particular classes in the community, *which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of [the protection of the laws] which others enjoy*”⁴¹³ The Court further determined that exclusion is “a stimulant to that race prejudice *which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.*”⁴¹⁴ Thus, *Strauder*’s focus was on justice and the way that racial prejudice impedes justice. It is not the appearance of injustice or the psychological pain of exclusion or the existence of stereotypes that constitutes the harm of racial discrimination in jury selection; it is racially biased results.

Such a definition of the threatened harm implies not the extraordinariness of racial discrimination, but its frequency. It does not censure perceptions of difference about black and white jurors and their likely biases, but acknowledges them. This is not to say that *all* assumptions of difference are permissible. For example, the Court in *Strauder* explicitly prohibited the assumption that African Americans are unfit to be jurors.⁴¹⁵ Moreover, *Strauder* did not endorse the same perception about differences that *Swain* later did, for *Swain* permitted the assumption that black jurors are more likely to be biased in black defendant cases than are white jurors;⁴¹⁶ *Strauder* assumed the contrary, that black jurors are less likely to be biased.

The assumptions that are forbidden the state, and the Court, are those assumptions that increase the likelihood that juror bias will affect the adjudication of the defendant’s guilt. Which assumptions increase that likelihood is not a question that abstract logic can answer; only an examination of social reality can do that. The specific assumption that *Strauder* makes—that the total exclusion of

413. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) (emphasis added).

414. *Id.* at 308 (emphasis added).

415. *Id.* at 307, 310.

416. *See Swain v. Alabama*, 380 U.S. 202, 219 (1965).

black jurors from black defendant cases is likely to increase the risk of racially biased adjudications—is still valid today⁴¹⁷

When we begin with *Strauder*, the answer to the question of “whose right is it?” flows from *Strauder*’s conception of the harm at stake rather than an attempt to discern a pattern from the most recent cases. The defendant’s right to racially unbiased results is primary. But the defendant’s right is not the only right at stake, for sometimes a defendant will benefit from racial bias in the adjudication of guilt. The victim, and the larger community also have a very large stake in the outcome, and a right to racially unbiased determinations of guilt.⁴¹⁸ The juror does not have such a claim. While a citizen’s general equal protection right to nondiscriminatory treatment does not vanish at the jury box, the juror has no *special* right that flows from the risk of biased adjudications of guilt.

The *Strauder* conception of racial discrimination has one obvious and inescapable implication for peremptory challenge law: race-based *exclusionary* strikes are forbidden. When the defendant is a member of a racial minority and the prosecutor strikes a potential juror who is a member of that racial minority in order to have no persons of that race on the panel or, if that is not possible, to decrease the number of persons of that race to less than half, that is racial discrimination. In most parts of the country, then, the prosecutor does not engage in impermissible racial discrimination (at least in the *Strauder* sense)⁴¹⁹ when striking a white juror, regardless of the race of the defendant or victims, even when the prosecutor’s motive is to decrease the number of white persons on the panel. This is so because the risk of racial bias is either de-

417. See *supra* part III.B.

418. See *Batson v. Kentucky*, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring) (suggesting that the defendant’s exercise of the peremptory challenge may cause “prejudice against his prosecution”).

419. Of course, the juror might have an ordinary equal protection claim, but it should not prevail when the prosecutor’s practice increases the likelihood of a racially just outcome. The interests on the other side of the balance outweigh the juror’s right or, to put it differently, the strict scrutiny standard is met. If the prosecutor strikes a juror on the basis of race where the likelihood of racial justice is *not* furthered by the strike—for example, striking a black juror in a white defendant/white victim case in the belief that black jurors are more acquittal prone—then that strike is unjustifiable discrimination against the black juror.

creased or unaltered by the prosecutor's actions. Thus, if the prosecutor in *McCollum* had attempted to increase the likelihood that some black persons would serve on McCollum's jury, this would not have been discrimination according to *Strauder*. Of course, if the panel is predominantly black, the conclusion in a white defendant case would be different, because removing white persons might well increase the likelihood of a racially biased adjudication. While the phenomenon of anti-white bias on the part of black jurors is less well-established than the phenomenon of anti-black bias on the part of white jurors, it too has substantial empirical support.⁴²⁰

The challenges by defense attorneys are subject to the same analysis. These challenges constitute racial discrimination when the defense attorney intends to increase the risk of a racially biased adjudication of guilt. Thus, when the defense attorney attempts to use peremptory challenges to prevent all persons who differ racially from the defendant from sitting on the jury or, where that is not possible, to decrease the number of racially different persons to less than half of the panel, the attorney has engaged in jury discrimination. When defense peremptory challenges are used to increase the likelihood that some members of the defendant's race will sit on the defendant's jury (but not dominate it) there is no jury discrimination. Under this model, the distinction advanced by the NAACP Legal Defense Fund amicus brief in *McCollum* is correct: "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors."⁴²¹

Thus, *Strauder* leaves us with a far more contextualized view of what constitutes racial discrimination in jury selection. I am sure there are several possible articulations of this view, but here is a rough definition: racial discrimination in jury selection is any jury selection practice that is intended to increase the likelihood that racial bias will influence the outcome of a particular criminal trial. Such a definition (hereinafter referred to as "the *Strauder* model")

420. See Johnson, *supra* note 50, at 1625-40, 1696-97.

421. Brief of the NAACP Legal Defense and Educational Fund, Inc., at *5, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (No. 91-372) (LEXIS, Genfed Library, Briefs file) (suggesting reversal).

is not inconsistent with the intent standard, because it aims at "because of" rather than "in spite of" discrimination on the part of jurors, and intentional free-riding on that bias by courts and attorneys.

B. Possible Implications of the Strauder Model

A *Strauder*-inspired definition of racial discrimination in jury selection poses the question of how to determine whether a selection practice is intended to increase the likelihood that bias will affect an outcome. Such a definition also leaves open the question of when the state is implicated in the racial discrimination it defines and, thus, when such discrimination is constitutionally prohibited.

1. The "Breadth" of Strauder Model Discrimination

Professor Underwood rejects a defendant-based theory of jury selection rights in large part because she thinks that "the theory that race-based jury selection produces a jury that decides a case in a racially biased manner" ultimately implies that "every white juror should be excluded as biased and the black defendant should be tried by an all-black jury."⁴²² Observing that the Court always has refused to order juries of any particular racial composition and, more recently has refused to grant retroactive effect to *Batson*, reasoning that it does not have "a fundamental impact on the integrity of factfinding,"⁴²³ she concludes that the Court, therefore, has rejected the underlying theory—and so rejects it herself. As I noted earlier in this Article, I think this reasoning is backward. One *starts* with life, not law, and with experience, not logic, at least when the two so violently conflict.⁴²⁴

The assertion that acknowledging the prevalence of racial bias will lead to the cliff of all-black juries is simply incorrect, as is the refusal to acknowledge the prevalence of bias for fear of going over the edge. First, acknowledging the prevalence of racial bias does

422. Underwood, *supra* note 11, at 730.

423. *Id.* at 731 (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986)).

424. "The life of the law has not been logic: it has been experience." OLIVER W. HOLMES, *THE COMMON LAW* 1 (1881). Moreover, the "logic" of the law runs both from the cases cited by Professor Underwood and from *Strauder*

not mean that every race-based jury selection procedure actually produces a jury that decides a case in a racially biased manner, nor does it mean that every white juror should be excluded as biased. So far as I can tell, no commentator has asserted that *Strauder*, or the empirical evidence on race and guilt adjudication, supports a claim that *all* white jurors are biased in black defendant cases or that *no* black jurors are biased in such cases. Rather, the argument and the evidence is that white jurors, as a group, are more likely to be biased against black defendants.

Such a perspective does not compel the conclusion that black defendants get all-black juries. Nothing, not even an all black jury, can *assure* the black defendant of a racially unbiased adjudication of her guilt. In a racist society, no group is a completely safe harbor from racial prejudice; *some* black persons also discriminate against black people.⁴²⁵ It is a matter of probabilities, as it always is when the impartiality of a particular jury is at stake, regardless of whether or not race is an issue. We never *know* that a particular jury will judge the defendant's guilt impartially, but we do know that some juries are more likely than others to do so. Any "remedy" for the risk of racial bias, short of prohibiting all criminal convictions, is therefore, inevitably, the result of some trade-offs.

A variety of different trade-offs are possible within the *Strauder* model. One way of cataloging the possibilities is through state action doctrine. But even the most expansive plausible vision of state action doctrine is unlikely to lead to the conclusion of all-black juries from the premise of the *Strauder* conception of racial discrimination in jury selection. If the state simply fails to affirmatively mandate all-black juries, how has it intended to increase the likelihood that racial bias will influence the outcome of a particular trial?⁴²⁶ Moreover, it is hard for me to see how the *Strauder* model

425. Some members of minority groups "respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes toward the minority." *Castaneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (citing to sociological studies regarding minorities and minority groups' means of acclimating themselves to the "dominant," i.e., white, society).

426. I suppose one could argue that the state is aware that an all-black jury would increase the likelihood of a racially unbiased adjudication of guilt and that it *could* mandate such a jury. But this ignores two parts of the *Strauder* conception of jury selection discrimination. First, *Strauder* discrimination requires that the practice *increase* the level of bias. A refusal to revamp the jury system completely can hardly be characterized as an increase

would even lead to a requirement that *some* black jurors sit on black defendants' juries. I have made the argument elsewhere that the Constitution should be read to require a minimum of three minority race jurors in minority race defendant cases,⁴²⁷ and I do not retreat from that argument. But that argument does not follow from the *Strauder* intent-to-increase-the-likelihood-of-racial-bias theory of jury selection discrimination. Rejection of its conclusion therefore demonstrates little about which model of jury selection discrimination to embrace.

If the state action requirement is read narrowly, a *Strauder*-based conception of jury discrimination would prohibit only prosecutorial strikes aimed at eliminating persons of the defendant's race from her jury, or reducing the number of such persons below half the number on the jury. For defendants of color or, more precisely, defendants whose race is in a minority in the community in which they will be tried, the *Strauder* model, even with this narrow conception of state action, would be an improvement over the color-consciousness model. It would be better because "minority" defendants would be free to use their peremptory challenges to try to increase the number of persons of their own race sitting on their juries. It would also be better because, for reasons I shall address shortly, the *Strauder* model encourages a more searching inquiry of why prosecutors use peremptory challenges to eliminate "minority" jurors. Moreover, "minority" victims would benefit because prosecutors would be permitted to try to increase the representation of "minority" jurors on a panel trying a case involving a defendant who is a member of a majority group and a victim who is a member of a minority group.

The public interest in racial justice also would be served by these changes. The only loss to the public from the change in models would arise in the cases in which "majority" defendants were, under the more restricted view of state action, permitted to try to strike all or more "minority" jurors to achieve a jury biased in

over any situation that plausibly might be considered the starting point of the analysis. Second, *Strauder* discrimination requires an *intent* to increase the risk of racial bias. Certainly the pedigree of, and values underlying, the representative jury renders credible the assertion that the state resists the innovation of the all-black jury in spite of, rather than because of, its effects on racial bias.

427. Johnson, *supra* note 50, at 1695-1700.

their favor. This, of course, is not a loss due to the *Strauder* model, but due to a more restricted conception of state action than presently governs jury selection cases.

Indeed, I think adoption of a *Strauder* model of jury selection discrimination renders the broad view of state action in jury selection vastly more attractive. The drawbacks cited by Justices O'Connor and Thomas would no longer be present, for minority defendants would become free to use their peremptory challenges to increase minority representation on the jury. Although strikes by the defense attorney would constitute state action, they would not be forbidden. Such strikes are not *Strauder* discrimination because they do not attempt to increase the likelihood that racial bias will influence the outcome of that particular trial. On the other hand, defense attorney strikes in a situation like that in *McCullum* would be forbidden, because a defense attorney's attempt to rid the jury of black jurors in a white defendant/black victim case is an attempt to increase the likelihood that racial bias would influence the determination of guilt in that particular case.

Innocent defendants, true victims, and the public, all gain from this alternative conception of racial discrimination. I do not think the losses incurred by those who *benefit* from increasing the likelihood that racial discrimination will influence a particular verdict should weigh against a switch. Thus, the only interest left to consider is that of the juror.

The *Strauder* model would subjugate the juror's interest in not being struck on the basis of race to the interests of the defendant, the victim, and the public in unbiased adjudications of guilt. Nevertheless, I think the *Strauder* model of jury selection discrimination is more beneficial to jurors as a group than is the color-consciousness model that now holds sway. In part, this is because the points of actual conflict are relatively few and typically less injurious to jurors than the protected instances. Thus, under a *Strauder* model, the strike of a majority juror designed to increase the representation of the minority, whether by the defense or the prosecution, does not constitute jury selection discrimination. It is hard for me to imagine, however, that the juror suffers "deep injury" in such a case; first, because it is unlikely that the juror will even recognize the strike as racial discrimination and, second, because she hardly can construe it as a statement of her racially deter-

mined unfitness for jury duty, or citizenship, or anything else, given that the majority of the jury will be composed of persons of her race.⁴²⁸ The reason that these relatively small losses to jurors do not support—even weakly—the prevailing color-consciousness model is because jurors, *like* defendants, victims, and the public, would gain from another change implied by a theory of racial discrimination in jury selection that is animated by concern for racial justice.

2. *The Depth of Strauder Model Discrimination*

A concern for racial justice roughly translates into a prohibition against racially exclusionary strikes. This definition, like the prevailing one, poses the question of how to identify forbidden strikes. How to approach that question, though not its precise answer, can be inferred from the conception of discrimination.

Strauder's sensitivity to the prevalence of racial prejudice, and its focus on the way that prejudice translates into unequal justice, suggests an approach to the identification of prohibited discrimination that does not proceed by formal deduction from premises (such as the premise of no differences) but begins with an examination of the realities of prejudice. At the very least this means considering the prevalence, covertness, and even unconsciousness of much modern prejudice.⁴²⁹ One could not start with a *Strauder* model of discrimination and get to *Hernandez*, at least not in this culture.

Where might such a model lead? Certainly it would prompt closer scrutiny; demeanor evidence would be treated less deferentially, and a heavier weight would be placed on the racially dispa-

428. Moreover, if the attorney was not acting to *increase* the likelihood of an unbiased determination, I suppose the juror still might raise a garden variety equal protection claim: that a governmental action was taken on the basis of her race. Thus, if the prosecutor struck a black juror in a white victim/white defendant case under the theory that black jurors are simply more prone to acquit than are white jurors, there would be no jury discrimination violation, but the juror could still make an ordinary claim of racial discrimination. Because the prosecutor would not have the justification of attempting to increase the likelihood of a fair determination of guilt, she would prevail—if it was worth it for her to raise the claim, which I doubt. If the relevant third party standing doctrine is left intact, the defendant might be permitted to raise that claim too, but I suspect that a *Strauder* redefinition of the jury selection right would take some of the wind from the third party standing sail.

429. See *supra* notes 344-87 and accompanying text.

rate impact of any stated justification. Such a model also might lead to a closer examination of particular racial groups, inquiry into the characteristics that have traditionally been used to justify discrimination against them,⁴³⁰ and consideration of the dynamics of prejudice in a particular community. Arguably such particularization and skepticism would be costly, but at least we would get something in return for the costs incurred. Defendants, victims, and the community would reap the concrete gain of more racially just results as well as the concomitant psychological gain of believing that the courts actually were attempting to dispense justice. Even jurors would feel the injury of being struck for apparently racial reasons less frequently. But if such an individualized inquiry is too labor or time intensive, the *Strauder* model could lead us to a vastly more efficient version of *Batson* hearings.

To make peremptory challenge law truly congruent with venire selection law, as *Batson* purports to do, we could add the gloss of later venire selection cases. The bottom line in those cases is that the venire must reflect the community, unless the state can present a powerful explanation for why it does not. Flimsy reasons, even if sincere, are not enough to rebut a *prima facie* case.⁴³¹ This rule might be interpreted in the peremptory challenge stage to mean that *prima facie* cases are the *only* inquiry, because, by definition, no powerful reason supports a peremptory challenge.⁴³² Thus, one bright-line rule might be that, regardless of motivation, any *combination* of challenges that increases the likelihood that racial bias will influence the outcome of a particular trial is impermissible. One might object that this moves the traditional line distinguishing between intent and effect, but, in response, it must be observed

430. This Article has moved, seemingly obliviously, from discrimination against African Americans to discrimination against Latinos to generalizations about discrimination against minorities. Actually, I have not been so much oblivious to, as ignorant of, what may be relevant differences. A *Strauder* model of jury discrimination argues for far greater sensitivity and refinement.

431. See, e.g., *Norris v. Alabama*, 294 U.S. 587, 598-99 (1935) (finding the state's burden of proof was not met by the jury commissioner's statements that he did not know any qualified African Americans).

432. Challenges with powerful reasons that support them are challenges for cause. Inauguration of such a new rule might lead to a broader definition of challenges for cause which, within limits, probably would be desirable in itself.

that the Court already has moved that line in the venire selection cases.

A slightly weaker form of this rule is also possible. If challenges for cause are too stiff a standard, the proponent of a strike with racially exclusionary effects could be required to justify that strike with evidence that the "justification" for that strike was a juror characteristic or response that routinely prompts peremptory challenges regardless of the race of the juror, defendant, or victim. While this weaker form is less attractive because it is less clear, more susceptible to false claims, and more labor intensive than the first proposed rule, it would still be better on all of those grounds than the color-consciousness model of *Hernandez*.

Undoubtedly, other possibilities exist. Each would involve its own balancing of the risk of racial bias against other costs. Even if a *Strauder* model of jury discrimination were to be adopted, the Court might not reach an optimal balance, but at least it would have the right things on the scale.

V CONCLUSION

In theory, "separate but equal" could have been a true characterization of race relations; maybe in some other world such a characterization was or is true. But in America, it has never been true, and any examination of concrete reality would have exposed its falsity. Sixty years of judicial assertions that it could be true, and should be true, did nothing to make it true.

Likewise, one can imagine many possible ways that an immutable characteristic could function in guilt adjudications, but such possibilities are not the question. In our culture, to look at race and criminal justice is not to see sameness, but difference. To proscribe racial discrimination in the jury selection is not to proscribe color-consciousness, but prejudice and, indeed, subordination. To say equality, therefore, is not to say formality, but fairness. It has always been so. Would that it were not. But until the day it is not, jury selection law should seek fairness for those vulnerable to racial prejudice. Fairness, *in this context*, comes from inclusion. How much inclusiveness we are willing to pay for can be argued, but arguments that racial inclusiveness is irrelevant to fairness in criminal trials should be sent to the same graveyard that now inters "separate but equal."